87-1208

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONNA OBERG, *et al.*,
Petitioners,

v.

AETNA CASUALTY & SURETY CO. and
A. H. ROBINS CO.,
Respondents.

ALEXIA ANDERSON, *et al.*,
Petitioners,

v.

AETNA CASUALTY & SURETY CO. and
A. H. ROBINS CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the courts below erred in interpreting § 105(a) of the Bankruptcy Code, 11 U.S.C. § 105(a), to authorize an injunction staying petitioners from pursuing civil actions filed on behalf of thousands of women injured by the Dalkon Shield intrauterine device against a party which is not a debtor in bankruptcy. In a totally unprecedented decision, the Court of Appeals has interpreted § 105(a) to authorize a stay of petitioners' actions against the liability insurance carrier of the manufacturer of the intrauterine device—where the actions seek to recover damages only from the assets of the insurance carrier and only for the fraudulent and tortious acts of the carrier, where the actions will have no adverse financial impact on the debtor, and where no showing has been made that the pursuit of the civil actions will interfere with the debtor's ongoing efforts at reorganization in bankruptcy.

LIST OF PARTIES

The Court of Appeals consolidated three appeals for briefing and disposition. In Nos. 87-2517 and 87-2595 the plaintiff-appellants were petitioner Donna Oberg and twenty-six additional women (and ten spouses) who are Dalkon Shield victims, all residing in New Hampshire. The defendant-appellee was respondent Aetna Casualty & Surety Co. ("Aetna"). The debtor in bankruptcy, respondent A. H. Robins Company ("Robins"), which had intervened in the proceedings in the District Court, was also aligned as an appellee.

In No. 87-2518 the plaintiff-appellants were Alexia Anderson and approximately 1400 additional women (and their spouses and offspring) who are Dalkon Shield victims.* The defendant-appellee and intervenor in the proceedings below were respondents Aetna and Robins, respectively.

The parties who were individually named as plaintiffs in the District Court proceedings, all of whom are petitioners in this Court, are too numerous to list in the body of this Petition. They are listed instead in Appendix F, at pp. 31a-65a.

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* The Anderson suit originally was filed on August 21, 1986, in the United States District Court for the District of Kansas on behalf of Ms. Anderson and 4,006 additional named plaintiffs. That suit was dismissed without prejudice to plaintiffs' seeking relief from the bankruptcy stay that had been entered by the United States District Court for the Eastern District of Virginia. The Request for Relief from the stay was filed on October 7, 1986, on behalf of Ms. Anderson and the 1,380 additional parties listed as petitioners in Appendix F.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners Donna Oberg, Alexia Anderson, and thousands of other similarly-situated Dalkon Shield victims respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceedings on September 9, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 828 F.2d 1023, and is reprinted

in Appendix A, at pp. 1a-8a. The Court of Appeals denied a timely Petition For Rehearing And Suggestion For Rehearing In Banc on October 23, 1987, in an Order reprinted in Appendix B, at pp. 9a-10a.

The underlying orders, memoranda and rulings from the bench entered by the United States District Court for the Eastern District of Virginia (Merhige, S.D.J.) have not been reported. They are reprinted in Appendices C, D and E, at pp. 11a-30a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 9, 1987. The Court denied a timely Petition For Rehearing And Suggestion For Rehearing In Banc in an Order dated October 23, 1987. This Petition is filed within ninety days of the entry of that Order. *See* 28 U.S.C. § 2101(c). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

11 U.S.C. § 105. Power of court.

(a) The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

STATEMENT OF THE CASE

The Dalkon Shield is an intrauterine device that was manufactured and distributed by respondent Robins from 1971 through 1974. Manufacture of the device was discontinued in that year because of a rising tide of complaints and lawsuits alleging serious injuries by women

who had used the device. Robins did not recall the device, however, until mid-1984.

In August, 1985, Robins filed a voluntary petition for reorganization under Chapter 11 of the Bankrputcy Code in the United States District Court for the Eastern District of Virginia. That filing was precipitated by the massive problems arising out of the continuing flood of Dalkon Shield claims and lawsuits, and the financial burdens caused by the payment by Robins and its liability insurance carrier, respondent Aetna, of more than 500 million dollars in judgments and settlements to Dalkon Shield victims and their families over the preceding decade.

The filing of the Chapter 11 petition automatically stayed all pending actions that had been filed against the debtor Robins, pursuant to 11 U.S.C. § 362(a).[1] A re-

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[1] 11 U.S.C. § 362(a) provides as follows:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3), operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien

curring question since Robins' bankruptcy filing has been whether Aetna may be shielded from the consequences of its own tortious and fraudulent actions by orders of the District Court overseeing the Robins bankruptcy proceedings, acting pursuant to its authority to stay litigation granted under the Bankruptcy Code.

The petitioners in this action have been denied permission by the District Court to file and pursue diversity actions naming Aetna alone as a defendant in the United States District Court for the District of Kansas and the United States District Court for the District of New Hampshire. Petitioners' complaints against Aetna allege that as Robins' product liability insurer Aetna (1) took over from Robins in 1975 the responsibility to monitor the performance of the Dalkon Shield and the decision as to whether or not to recall that dangerous product; (2) concealed the fact that Robins had engaged in the destruction of evidence in 1975; and (3) commissioned (and then concealed the negative results of) at least eight scientific studies on the safety and efficacy of the Dalkon Shield. Petitioners, whose injuries include sterility, infertility, surgical colostomy, septic abortions, spontaneous abortions, birth defects and infections, seek to prove Aetna's liability for those injuries and to recover damages from Aetna for its own tortious and fraudulent misconduct. The Court of Appeals has affirmed the District Court's denial of petitioners' rights to pursue their claims against Aetna.

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secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

The legal issues presented by this Petition have their genesis in the 1986 decision of the Court of Appeals entered in *A. H. Robins Co.* v. *Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 251 (1986). In *Piccinin* the appellants, Dalkon Shield victims, challenged the authority of the District Court overseeing the Robins bankruptcy proceedings to enjoin litigation against co-defendants of Robins across the country. The Court of Appeals affirmed the District Court's broad injunction against litigation filed by Dalkon Shield victims against Robins' non-debtor co-defendants, including in some cases respondent Aetna, on four independent bases.[2]

First, relying on 11 U.S.C. § 362(a)(1), the Court determined that there was such an identity of interest between Robins and Aetna that Robins could be deemed the real party in interest in any claim against Aetna and that a judgment against Aetna would, in effect, be a judgment against the debtor in bankruptcy. *See* 788 F.2d at 999-1001. Second, relying on 11 U.S.C. § 362(a)(3), the Court determined that the Aetna insurance policy issued to Robins was property of the bankruptcy estate, and that any actions against Aetna which might be satisfied from the proceeds of that policy should be enjoined. *Id.* at 1001-02. Third, the Court relied on 11 U.S.C. § 105(a) to affirm the District Court's power to enjoin actions that might interfere with the debtor's reorganization. *Id.* at 1002-03. Finally, the Court relied on the "inherent power of courts under their general equity powers and in the efficient management of the[ir] dockets" as support for the injunction that had been entered by the District Court. *Id.* at 1003.

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[2] The "temporary" injunction that was the subject of the appeal in *Piccinin*, and that remains in effect today, was entered on October 11, 1985. It prohibits Dalkon Shield victims from pursuing claims against individual officers and employees of Robins for their alleged tortious and fraudulent actions, as well as claims against Aetna. *See* 788 F.2d at 1007.

After the decision in *Piccinin*, the petitioners here set out to file claims against Aetna alone in such a fashion that it would be clear that they were seeking recovery against Aetna only, and not Robins, for the wrongful acts committed or participated in by Aetna, and that damages were sought from the general assets of Aetna, and not from the proceeds of any policies of insurance issued by Aetna to Robins. Petitioners also agreed that they did not need, and would not seek, additional discovery from Robins in the pursuit of their claims. Thus, petitioners attempted to minimize any potential for interference with the ongoing reorganization efforts of the debtor Robins in the Chapter 11 proceedings.

In December, 1986 the District Court denied petitioners' motions to lift the stay or to modify its injunction. It refused to allow petitioners' lawsuits to be filed. *See* Appendices C & D, pp. 11a-18a. The District Court did not specifically address the question whether it had continuing authority to stay or enjoin petitioners' lawsuits. Rather, the Court observed that another action, *Breland* v. *Aetna Casualty & Surety Co.*, No. 86-0315-R, styled as a class action, was pending in the Eastern District of Virginia and raised similar claims against Aetna for negligence, strict liability, breach of warranty, fraud, conspiracy and racketeering. Relying solely on the pendency of *Breland*, the Court denied petitioners' requests for relief from the stay without prejudice, subject to their ability to refile if the Court did not certify *Breland* as a class action or if it entered an order permitting individual members of the *Breland* class to opt out and petitioners exercised that option. Appendix C at p. 14a; Appendix D at p. 18a.[3]

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[3] In January, 1987, the Oberg petitioners filed a renewed motion seeking leave to file and pursue their claims against Aetna in New Hampshire, noting that New Hampshire was a uniquely favorable forum for the resolution of these claims because of its six year statute of limitations. Petitioners also noted their opposi-

The Court of Appeals affirmed the District Court's orders on different grounds. That Court recognized that the appropriate question was not whether another suit was pending which raised similar claims against Aetna as those sought to be raised by petitioners, but whether instead the District Court had the power under the Bankruptcy Code to enjoin or stay petitioners' suits. Although asking the appropriate question, the Court of Appeals reached the wrong result.

The Court of Appeals used its earlier decision in *Piccinin* as the launching point for its analysis. It recognized, as respondents were forced to concede, that 11 U.S.C. § 362(a)(1) was inapplicable because petitioners' complaints expressly disavowed any effort to recover from the proceeds of the insurance policy issued by Aetna to Robins, or from any other assets of Robins. Appendix A, at p. 6a. The Court also assumed, without deciding, that because New Hampshire and Kansas comparative negligence law precludes contribution or indemnity among joint tortfeasors, a suit against Aetna based on its own tortious misconduct would not implicate any property of the Robins bankruptcy estate. Thus, the stay could not be supported by 11 U.S.C. § 362(a)(3) either. *Id.*

But, relying solely on the general authority set forth in 11 U.S.C. § 105(a), the Court of Appeals er-

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tion to having their claims resolved through the *Breland* proceeding. In April, the District Court denied this request for relief on the basis that although it had certified *Breland* as a class action, it had not yet decided whether members of the class would be free to "opt out" or whether it would instead be a so-called "mandatory" class action. Appendix F, at p. 30a. Petitioners' appeal from the denial of the second Oberg motion for relief from the stay was consolidated with petitioners' earlier appeals. The Court of Appeals affirmed the District Court's ruling that the renewed motion was premature. Appendix A, at p. 8a. To this date, the District Court still has not designated *Breland* as an "opt out" class action, and the petitioners still have not been afforded the opportunity to express their opposition to being represented in *Breland*.

roneously concluded that petitioners' lawsuits could be enjoined because their pendency would create irreparable harm to the bankruptcy estate. The Court reasoned, although no specific findings to this effect had been made by the District Court, that the proposed lawsuits against Aetna would place burdens on Robins' officers, directors and employees in responding to discovery requests. These "burdens" would "exhaust their energies and thus interfere with the debtor's reorganization." Appendix A, at pp. 6a-7a.

The Court of Appeals recognized that petitioners had expressly agreed *not* to depose any of Robins' officers, directors or employees in pursuing their claims against Aetna, or to otherwise subject Robins to any costs or burdens of litigation, and to proceed against Aetna based solely on the extensive discovery completed over many years in the nationwide Dalkon Shield litigation prior to the institution of the bankruptcy proceedings. But the Court dismissed the importance of petitioners' agreement, reasoning that petitioners could not "compel Aetna to follow the same hands-off policy." *Id.* at p. 7a.

Without stopping to examine whether its rationale was supported by controlling state law, the Court held that "[u]nder a system of comparative negligence, the trier of fact must determine Robins' relative fault in order to determine Aetna's relative fault," that Aetna logically would defend itself by arguing that Robins was fully responsible for petitioners' injuries, that "Robins will inexorably be drawn into this litigation," and that the burdens thereby placed on Robins' personnel would detract from the bankruptcy reorganization. *Id.* The Court of Appeals thus affirmed the District Court's authority to stay petitioners' actions on the novel ground that § 105 (a) of the Bankruptcy Code permits a bankruptcy court to enjoin litigation against a non-debtor third party to the bankruptcy proceedings, because of a likelihood that the non-debtor third party might attempt to involve the

debtor's employees in the contemplated litigation, and thereby detract from the debtor's reorganization efforts.

The Oberg petitioners filed a timely Petition For Rehearing And Suggestion For Rehearing In Banc. That Petition pointedly demonstrated that under applicable New Hampshire law, in a suit against Aetna, the trier of fact would not compare the relative fault of Aetna and Robins, or any other party, as the Court of Appeals erroneously had assumed. Rather, because joint tortfeasors are jointly and severally liable, and because there is no contribution among joint tortfeasors, in a suit by petitioners against Aetna governed by New Hampshire law petitioners would recover all their damages from Aetna, regardless of the fault of Robins or any other party, so long as Aetna was found to be more at fault than petitioners.[4] Thus, contrary to the Court of Appeals' unsupported assumptions about controlling state law, Robins' degree of fault relative to Aetna's would be wholly irrelevant in the lawsuits petitioners seek to pursue. The Court of Appeals denied this Petition For Rehearing without explanation. Appendix B.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision creates an unprecedented power in the bankruptcy courts of this nation to enjoin litigation that does not involve the debtor in bankruptcy as a party, and that has no conceivable adverse financial impact on the debtor's estate. The Court's decision rests entirely on unproven speculation that in a suit filed against respondent Aetna for its tortious miscon-

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[4] *See, e.g., Simonsen* v. *Barlo Plastics Co.*, 551 F.2d 469 (1st Cir. 1977); *Kantor* v. *The Norwood Group, Inc.*, 127 N.H. 831, 508 A.2d 1078 (1986); *Lavoie* v. *Hollinracke*, 127 N.H. 764, 513 A.2d 316 (1986); *Hurley* v. *Public Service Co.*, 123 N.H. 750, 465 A.2d 1217 (1983); *Consolidated Utility Equipment Services, Inc.* v. *Emhart Manufacturing Corp.*, 123 N.H. 258, 459 A.2d 287 (1983); *Mihoy* v. *Proulx*, 113 N.H. 698, 313 A.2d 723 (1973).

duct, Aetna might seek to conduct discovery of Robins, its officers and employees in an effort to develop its own defense, and that such discovery obligations would unduly interfere with and irreparably harm the ongoing efforts by Robins to reorganize under Chapter 11 of the Bankruptcy Code. Yet nowhere in the record is there so much as a mention of what discovery measures Aetna might pursue in the petitioners' lawsuits, which Robins' employees Aetna might seek to depose, whether those individuals remain employees of Robins today, whether any of those employees are actively involved in the Chapter 11 proceedings, and to what extent, if any, Aetna's assumed future efforts to conduct discovery would in fact interfere with the Chapter 11 reorganization of Robins.

The Court of Appeals' decision is bizarre. It expands the bankruptcy courts' powers under 11 U.S.C. § 105(a) beyond Congress' wildest expectations when it enacted the Bankruptcy Code. It is unsupported by any other federal decision construing § 105(a). It is in conflict with numerous other decisions of the Courts of Appeals, the District Courts and the Bankruptcy Courts interpreting when and how the benefits of a stay of litigation resulting from the debtor's filing of a petition in bankruptcy may be extended to non-debtors. It interprets the standards for issuing a stay under § 105(a) in a manner that is in conflict with applicable decisions of this Court, as well as numerous other federal courts.

Finally, the Court of Appeals has issued this novel and important decision broadly interpreting the injunctive powers of bankruptcy courts under § 105(a) in a case that affects the rights of thousands of Dalkon Shield victims to pursue presumptively valid claims for relief, and leaves them in a judicial limbo, waiting for the District Court to tell them when, if ever, they may return to that Court seeking permission to pursue their claims. *See* footnote 3 *supra*. In sum, there are ample grounds for this Court to exercise its discretion and grant plenary

review to the important question presented by this Petition. *See* Supreme Court Rule 17.1.

A. The *Piccinin* Decision Was Itself In Conflict With Numerous Decisions Of The Courts Of Appeals.

To comprehend fully the unprecedented scope of the Court of Appeals' decision in this case it is necessary to place it in context. Prior to the Court of Appeals' decision in *Piccinin*, discussed on page 5 *supra*, it had been the unanimous view of the Courts of Appeals, including the Court of Appeals for the Fourth Circuit, that the automatic stay provisions of § 362(a) of the Bankruptcy Code had *no application* to litigation filed against parties other than the debtor in bankruptcy. *See, e.g., Fortier* v. *Dona Anna Plaza Partners*, 747 F.2d 1324, 1329-30 (10th Cir. 1984); *Williford* v. *Armstrong World Industries, Inc.*, 715 F.2d 124, 126-27 (4th Cir. 1983); *Lynch* v. *Johns-Manville Sales Corp.*, 710 F.2d 1194, 1196-98 (6th Cir. 1983); *Wedgeworth* v. *Fibreboard Corp.*, 706 F.2d 541, 544-46 (5th Cir. 1983); *Austin* v. *Unarco Industries, Inc.*, 705 F.2d 1, 4-5 (1st Cir.), *cert. dismissed*, 463 U.S. 1247 (1983); *Pitts* v. *Unarco Industries, Inc.*, 698 F.2d 313, 314 (7th Cir.), *cert. denied*, 464 U.S. 1003 (1983).

The Court of Appeals' decision in *Piccinin* substantially departed from past precedent in relying extensively on § 362(a) of the Bankruptcy Code to affirm the District Court's October 11, 1985 injunction against virtually all litigation raising claims by Dalkon Shield victims. The *Piccinin* decision subsequently has been described by the Court of Appeals for the Second Circuit as a limited exception to the general rule that was adopted in "unusual circumstances." *Teachers Insurance & Annuity Ass'n* v. *Butler*, 803 F.2d 61, 65 (2d Cir. 1986). The Court of Appeals for the Fifth Circuit recently has interpreted *Piccinin*'s extension of the benefit of the automatic stay provisions of § 362(a) to parties who have not filed for bankruptcy as being limited to

"circumstances where the debtor and the nonbankrupt party can be considered one entity or as having a unitary interest . . . ." *Matter of S. I. Acquisition, Inc.*, 817 F.2d 1142, 1148 (5th Cir. 1987).[5] Any such limits on the scope of *Piccinin* were cast aside by the Court of Appeals in this case.

B. The Decision Below Gives Unprecedented Scope To The Authority Of Bankruptcy Courts Under 11 U.S.C. § 105(a), Is In Conflict With Other Decisions, And Is Inconsistent With The Intent Of Congress.

The decision below, unlike *Piccinin*, was bottomed solely on the authority of 11 U.S.C. § 105(a) since the Court of Appeals conceded there was no way to stretch the fabric of the automatic stay provisions in § 362(a) to cover the District Court's orders enjoining petitioners from litigating their claims against Aetna. Although there is some support in reported decisions of bankruptcy courts and district courts for the proposition that § 105 (a) authorizes a bankruputcy court, under certain limited circumstances, to enjoin proceedings against nondebtors, there is also authority to the contrary. Before the decision in this case, however, there was no reported decision that entered or affirmed such an injunction where the property of the debtor's estate was not imminently threatened by the litigation. This Court should grant plenary review to resolve the conflict that rages in the bankruptcy courts over the proper scope of § 105 (a). This case presents an ideal vehicle for the resolution of that conflict inasmuch as the Court of Appeals

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[5] *See also* 2 *Collier on Bankruptcy* § 362.02, at n.23 (15th ed. 1987) (in which the Court in *Piccinin* is described as "very broadly" interpreting the powers of a bankruptcy court under § 105(a) to enjoin litigation against officers of the debtor and other co-defendants). Prior to the decision below, even bankruptcy courts within the Fourth Circuit had predicted that *Piccinin* would be limited closely to its facts. *See In Re McLean Trucking Co.*, 74 B.R. 820, 825-26 (Bankr. W.D.N.C. 1987).

here interpreted § 105(a) more expansively than any other court ever so much as hinted in the past.[6]

There is no reported decision of any court applying § 105(a) to enjoin litigation where the only threat to the debtor posed by that litigation is that its officers or employees may be required by third parties to produce relevant documents or give testimony. The decision below also is unprecedented in its failure to recognize that even those courts that have broadly interpreted the scope of § 105(a) have emphasized the limited nature of the circumstances in which it may be used to enjoin third-party litigation, the temporary duration of any stays that may be entered, and the need for the debtor to prove conclusively that the stay is necessary to prevent irreparable injury that otherwise will be caused to the debtor. The Court of Appeals' decision affirmed the District Court's continued maintenance of a § 105(a) injunction without the debtor having offered any evidence to meet these stringent requirements.

The Court of Appeals' decision also cannot be reconciled with the intent of Congress, as reflected in the legislative history of the Bankruptcy Code.

1. *The Legislative History Of § 105(a).*

The Reports of the House of Representatives and Senate Judiciary Committees on the bills that became the Bankruptcy Code state in general terms that § 105(a) was designed to give bankruptcy courts broad authority to issue orders, analogous to the authority conferred upon Article III Courts by the All Writs Act, 28 U.S.C. § 1651. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 316-17 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News

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[6] The powers granted to bankruptcy courts under § 105(a) caused this Court concern in its decision invalidating the grant of jurisdiction to bankruptcy judges under the Code. *See Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 56, 85 (1982) (plurality opinion).

5963, 6273-74. *See also* S. Rep. No. 95-989, 95th Cong., 2d Sess. 29 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5815. Although the legislative history of § 105(a) is sparse, both Committees emphasized that the power to stay litigation in situations not contemplated by the automatic stay provisions of § 362(a) is limited, and is to be exercised with care. The Reports of both Committees state expressly:

> Stays or injunctions issued under [§ 105] will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions . . . . Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.

H.R. Rep. No. 95-595, *supra* at 342, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 6298; S. Rep. No. 95-589, *supra* at 51, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 5837.

Those courts that have construed § 105(a) to confer authority on the bankruptcy courts to enjoin litigation against nondebtors have emphasized that such a stay may be issued only after the debtor has met an extremely stringent burden of proof. One test that often has been repeated was formulated by the District Court in *In Re Otero Mills, Inc.*, 25 B.R. 1018 (D.N.M. 1982). That Court held:

> In order for the Court to enjoin a creditor's action against a codebtor or guarantor, the debtor must show: (1) irreparable harm to the bankruptcy estate if the injunction does not issue; (2) strong likelihood of success on the merits [*i.e.*, the probability of a successful plan for reorganization]; (3) no harm or minimal harm to the other party or parties [; and (4) that the injunction will serve the public interest].

25 B.R. at 1021.

The decisions following *Otero Mills*, mindful of Congress' expressed intent, typically stress the heavy burden of proof to be placed on the debtor before an injunction may be entered staying litigation against non-debtors, the temporary duration of any such third-party stay, and the requirement that other parties not be injured by the stay.[7]

The Court of Appeals in this case departed from Congress' intent in affirming the continuing effect of an injunction entered under § 105(a) where the District Court did not require the debtor to prove its entitlement to such injunctive relief under any standard.

2. *There Is A Substantial Conflict In Reported Decisions Over the Validity Of* Otero Mills.

The sole authority cited by the Court of Appeals in this case for its broad interpretation of § 105(a) was the *Otero Mills* decision. But the analysis of § 105(a) adopted in *Otero Mills* has been rejected by many other

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[7] *See, e.g., In Re TRS, Inc.*, 76 B.R. 805, 807-08 (Bankr. D. Kan. 1987) (the cases in which § 105(a) may be applied to stay actions against non-debtors are "limited" and "extraordinary"; while the burden of proof on the moving party is a heavy one and must be supported by substantial evidence); *Matter of Supermercado Gamboa, Inc.*, 68 B.R. 230, 234 (Bankr. D.P.R. 1986) (a generalized assertion of non-specific detrimental impact to the bankruptcy reorganization is not sufficient); *In Re Monroe Well Service, Inc.*, 67 B.R. 746, 752-53 (Bankr. E.D. Pa. 1986) (there must be a showing of "danger of imminent, irreparable harm to the estate or the debtor's ability to reorganize"; the court must balance the harm to the party who is sought to be enjoined and other societal interests); *In Re N-Ren Corp.*, 64 B.R. 773, 776-78 (Bankr. S.D. Ohio 1986); *Matter of Provincetown Boston Airline, Inc.*, 52 B.R. 620, 624-25 (Bankr. M.D. Fla. 1985); *Matter of A & B Heating & Air Conditioning, Inc.*, 48 B.R. 401, 403 (Bankr. M.D. Fla. 1985) ("before injunctive relief can be granted, the party seeking the protection must make a very clear case that the relief, if granted, would not damage the other party"); *In Re Lion Capital Group*, 44 B.R. 690, 701 (Bankr. S.D.N.Y. 1984).

courts. For example, the Court in *In Re Venture Properties, Inc.*, 37 B.R. 175, 177 (Bankr. D.N.H. 1984), flatly held that *Otero Mills* "was simply wrongly decided." The *Venture Properties* Court reasoned persuasively that there was no evidence that Congress intended for parties such as respondent Aetna to benefit from a stay of litigation unless they themselves " 'come into' the bankruptcy court with their liabilities *and* all their assets." *Id.* (emphasis in original).

The District Court in *In Re A.J. Mackay Co.*, 50 B.R. 756, 762 (D. Utah 1985), agreed that "*Otero Mills* and its progeny were wrongly decided." That Court held that a bankruptcy court's jurisdiction in a Chapter 11 case cannot be expanded beyond the debtor and its property.

In *In Re Juneau's Builders Center, Inc.*, 57 B.R. 254, 258 (Bankr. M.D. La. 1986), the Court held that stays entered under the authority of § 105(a) must be limited to circumstances in which the litigants to be enjoined are attempting to pressure the debtor through the third party, thereby accomplishing indirectly what the automatic stay prevents them from doing directly. The Court also criticized the *Otero Mills* decision for not requiring that the "privilege of a stay against creditor action should carry with it the burden of debtor regulation." *Id.* at 259.

The District Court in *In Re Continental Airlines, Inc.*, 61 B.R. 758, 781 n.47 (S.D. Tex. 1986), criticized the line of decisions, beginning with *Otero Mills*, that illustrated an "unbridled reliance upon the Code's extraordinary writ provision." That Court observed that "[s]ection 105 is to be relied upon in aid of the bankruptcy court's jurisdiction, but it does not provide a 'candy store' which allows the Court to pick and choose among properly promulgated rules which it likes or dislikes." *Id.* (quoting *In Re Arnage, Inc.*, 33 B.R. 662, 665 (Bankr. E.D. Mich 1983)).

The Court in *In Re Swann Gasoline Co.*, 62 B.R. 13, 13-14 (Bankr. E.D. Pa. 1986), held that application of

Otero Mills must be limited to situations in which the third-party litigation sought to be enjoined not only would seriously impair the debtor's operations and efforts to reorganize, but also would adversely or detrimentally pressure the debtor.

In *Matter of Supermercado Gamboa, Inc.*, 68 B.R. 230, 234 (Bankr. D.P.R. 1986), the Court opined that the "relaxed approach [to third-party stays under § 105] initiated in *In Re Otero Mills, Inc.* . . . and its progeny is simply bad law."

The foregoing discussion demonstrates that there is a substantial, continuing conflict reflected in federal judicial decisions across the country concerning the scope of the powers granted to the bankruptcy courts under § 105 (a). This Petition squarely presents the important question when, if ever, a party such as Aetna which has not submitted its assets to the jurisdiction of the bankruptcy courts may nonetheless be afforded protection against litigation by those courts. This Court should accept plenary review of this case if only to resolve the conflict about the scope of the bankruptcy courts' power to stay third-party litigation under § 105(a) of the new Bankruptcy Code, and to provide needed guidance to the bankruptcy courts.

3. *The Decision Below is Unprecedented.*

Even disregarding the conflict described above, the Court should grant this Petition for Writ of Certiorari. The decision below is totally unprecedented in authorizing the continuance of a "temporary" stay of litigation filed against a party not in bankruptcy, for a period of over two years, when the only alleged threat to the debtor is the speculative prospect that some of the debtor's officers or employees may be distracted from the reorganization process by the need to respond to discovery requests in the stayed litigation. In every decision following *Otero Mills*, and in *Otero Mills* itself, the third-party litigation that was stayed had been filed against officers or

employees of the debtor, or against parties who were also liable on debts owed by the debtor. These decisions all have stressed the resulting adverse financial impact on the debtor's estate that would be caused if the third-party litigation were permitted to proceed. The Court of Appeals in this case has, for the first time, authorized a stay under § 105(a) despite its own conclusion that the litigation enjoined would have no conceivable financial impact on the debtor's estate. *See* Appendix A, at p. 6a. The decision below thus stands alone among *Otero Mills*' progeny.

In *In Re Futura Industries, Inc.*, 69 B.R. 831, 835 (Bankr. E.D. Pa. 1987), the Court expressly limited *Piccinin* and *Otero Mills* to situations in which corporate officers, who would be indemnified by the debtor, were the targets of the third-party litigation. In a lengthy analysis of the *Otero Mills* line of cases, that same court earlier observed that all the reported decisions authorizing stays protecting non-debtors from litigation under § 105(a) could be broken down into three categories: (1) where the non-debtor defendant owns assets which will be a source of funds or credit for the debtor's proposed reorganization; (2) where the non-debtor defendant is a principal of the debtor whose energy and commitment to the Chapter 11 proceedings are essential to the formulation of a reorganization plan; and (3) where a judgment against the non-debtor defendant could be imputed to the debtor and thereby diminish the estate either through application of collateral estoppel or the effect of an indemnity agreement. *In Re Monroe Well Service, Inc.*, 67 B.R. 746, 751 (Bankr. E.D. Pa. 1986) (collecting cases).[8]

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[8] Similarly, the Court in *Matter of Provincetown Boston Airlines, Inc.*, 52 B.R. 620, 625-26 (Bankr. M.D. Fla. 1986), formulated two categories of cases in which § 105(a) had been held to authorize temporary stays of third-party litigation: where the non-debtor defendant is a key officer of the debtor and should be protected during the initial stages of a reorganization proceeding; and where the non-debtor defendant owns assets that were to be used to fund the plan of reorganization or to obtain credit for the debtor.

Even among courts accepting the validity of *Otero Mills*, there is no unanimity of opinion concerning the circumstances under which § 105(a) authorizes a third-party stay. For example, the Court in *Mahaffey* v. *E-C-P of Arizona, Inc.*, 40 B.R. 469, 474 (Bankr. D. Colo. 1984), rejected as "a dangerous precedent," the notion that creditors should be enjoined from suing key employees of the debtor or guarantors of the debtor's obligations, even if their efforts were essential to effectuating the debtor's reorganization, "absent evidence that such guarantor will contribute personal assets to the reorganization."

In sharp contrast to all the earlier precedents, the Court of Appeals in this case has affirmed the continued maintenance of a stay under § 105(a) that applies to litigation against a party which is neither a principal, officer, nor guarantor of the debtor, on the basis that the debtor or its employees conceivably could be called upon in the stayed litigation to provide discovery or to testify. The stay remains in place even though respondents Robins and Aetna never have told any court which of the debtor's employees Aetna may seek to depose or call to the stand in petitioners' lawsuits, whether those individuals remain employed by the debtor, and, if so, whether those employees have a significant role to play in the reorganization proceedings. And rather than protecting Robins by limiting or staying Aetna's requests for discovery, the District Court has protected Aetna by staying petitioners' lawsuits.[9] The Court of Appeals affirmed this

[9] This case is a far cry from the District Court and Bankruptcy Court decisions in *In Re Johns-Manville Corp.*, 40 B.R. 219 (S.D.N.Y. 1984), *aff'g*, 26 B.R. 420 (Bankr. S.D.N.Y. 1983). In that case the District Court affirmed a stay against discovery sought from the debtor and its employees by a former co-defendant of the debtor in pending product liability litigation. The Court held that the extensive discovery sought by the co-defendant would seriously interfere with the ongoing Chapter 11 proceedings. The Court properly stayed the discovery requests served on the debtor for a reasonable

stay despite the fact that it was assured that the petitioners' actions against Aetna would have no conceivable adverse financial impact on the estate of the debtor Robins. There simply is no limiting principle contained in the decision below which cabins the authority of bankruptcy judges to enjoin litigation under § 105(a).

C. The Decision Below Is In Conflict With A Controlling Decision Of This Court And Implicates Petitioners' Rights To Due Process.

The most fundamental limiting principles ignored by the Court of Appeals in espousing its expansive vision of bankruptcy court jurisdiction and power are the equitable principles set down by this Court in *Landis* v. *North American Co.*, 299 U.S. 248, 254-59 (1936). Justice Cardozo's opinion for the Court in *Landis* has been cited repeatedly by those courts interpreting the equitable power of bankruptcy judges to stay litigation in situations not contemplated by the express terms of § 362(a), whether under § 105(a) or under the "general discretionary power of courts to stay proceedings in the interest of justice and in control of their dockets." *See, e.g., Wedgeworth* v. *Fibreboard Corp.*, 706 F.2d 541, 544-45 (5th Cir. 1983); *In Re Continental Airlines, Inc.*, 61 B.R. 758, 781 (S.D. Tex. 1986); *In Re Arrow Huss, Inc.*, 51 B.R. 853, 859 (Bankr. D. Utah 1985); *Matter of A & B Heating & Air Conditioning, Inc.*, 48 B.R. 401, 403 (Bankr. M.D. Fla. 1985); *In Re Lion Capital Group*, 44 B.R. 690, 703 (S.D.N.Y. 1984).

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time to allow the debtor "a breathing period" in which to reorganize. The Court did not even intimate that the pendency of the discovery requests might warrant a stay enjoining in its entirety the underlying litigation against the debtor's co-defendants. If the discovery sought by Aetna from Robins in petitioners' lawsuits proves to be onerous, Robins can seek appropriate relief from the Bankruptcy Court. The potential that such discovery may be sought is no justification for enjoining petitioners' lawsuits against Aetna; nor did the courts below have the authority under the Bankruptcy Code to approve such a draconian injunction.

In *Landis* this Court made clear that a party seeking a stay of litigation bears the burden of justifying any delay that will result in that proceeding:

> [T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.

299 U.S. at 255. The Court also observed that a stay "is immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, so far at least as they are susceptible of prevision and description." *Id.* at 257.

The decision below is in conflict with *Landis* and the recent federal decisions that have paid heed to its principles. The petitioners here, numbering in the thousands, are Dalkon Shield victims seeking the opportunity to pursue legitimate claims for relief against alleged actions by Aetna that, if proven, are despicable. In spite of years of litigation, the victims remain uncompensated for serious physical injuries, infertility, spontaneous abortions and birth defects. The "temporary" injunction entered by the District Court over two years ago remains in place, with no termination date in sight. The promised opportunity to "opt out" of a proposed class action in which petitioners do not care to be represented has never come. *See* footnote 3 *supra*. Although the Court of Appeals paid "lip service" to this Court's recent holding "that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from [a] class [action] by executing and returning an 'opt out' or 'request for exclusion' form to the court," *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985), petitioners remain trapped in a judicial limbo

created by the District Court's failure to decide whether or not the *Breland* case should be an "opt out" class action. *See* Appendix A, at p. 8a.

The courts below have ignored the harm caused to petitioners by the continued pendency of the October 11, 1985 injunction, and have elevated over petitioners' rights to seek redress in the courts for their injuries a chimerical assertion that petitioners' pursuit of their claims against Aetna will cause irreparable injury to Robins' efforts at reorganization in bankruptcy. In so ruling, these courts have created from whole cloth a new power for federal bankruptcy courts that Congress never contemplated and that no other court ever has espoused. Thus, plenary review by this Court also is fully warranted to correct the lower courts' radical departures from the equitable principles stated in *Landis* and from the accepted and usual course of judicial proceedings.

CONCLUSION

For the reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-2517

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor,

DONNA OBERG, *et al.*,
Plaintiff-Appellant,

v.

AETNA CASUALTY & SURETY COMPANY,
Defendant-Appellee

A. H. ROBINS COMPANY, INCORPORATED,
Debtor-Intervenor

No. 87-2518

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor

ALEXIA ANDERSON, *et al.*,
Plaintiff-Appellant

v.

AETNA CASUALTY & SURETY COMPANY,
Defendant-Appellee

A.H. ROBINS COMPANY, INCORPORATED,
Debtor-Intervenor

No. 87-2595

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor

DONNA OBERG, *et al.*,
Plaintiff-Appellant

v.

AETNA CASUALTY & SURETY COMPANY,
Defendant-Appellee

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond
Robert R. Merhige, Jr., Senior District Court Judge
(CA-85-1307)

Argued: July 9, 1987 Decided: Sept. 9, 1987

Before: RUSSELL, WIDENER, and CHAPMAN, *Circuit Judges.*

Joseph F. McDowell, III (Cullity, Kelley & McDowell; John T. Baker; Bragg & Dubofsky, P.C.; Michael J. Farrell; Barry M. Taylor; Jenkins, Fenstermaker, Kreiger, Kayes & Farrell on brief) for Appellants; James S. Crockett, Jr. (William R. Cogar, Clifford W. Perrin, Jr.; Linda J. Thomason; Mays & Valentine on brief); W. Scott Street, III (A. Peter Brodell; Williams, Mullen, Christian & Dobbins; John G. Harkins, Jr.; Deborah F. Cohen; Pepper, Hamilton & Scheetz; Robert L. Elkins; M. Blane Michael; Robert G. McLusky; Jackson, Kelly, Holt & O'Farrell on brief) for Appellees.

RUSSELL, Circuit Judge:

Does our holding in *A.H. Robins Company v. Piccinin*, 788 F.2d 944 (4th Cir.), *cert. denied*, 107 S. Ct. 251 (1986), apply when the plaintiff-claimants seeking to sue the third-party defendant disavow any interest in the debtor's assets, and when the plaintiffs agree to so limit their discovery that they do not interfere with the debtor's rehabilitative process? We hold that under such circumstances the court has authority to stay the suit against the third-party defendant because that third party would inevitably be required to put a burden on the debtor in order to defend against the plaintiffs. We therefore affirm the district court's denial of the motions to lift the stay.

I.

The facts leading up to this litigation have been set forth in detail in *Piccinin*, so we need only review them briefly here. In *Piccinin* a group of plaintiffs, who claimed they were injured by the Dalkon Shield intrauterine device, sought to sue Aetna Casualty & Surety Company for its actions in connection with the Dalkon Shield. The Dalkon Shield was manufactured by A.H. Robins Company which has filed for reorganization in bankruptcy. Aetna, as Robins' product liability insurer, allegedly (1) took over from A.H. Robins the monitoring of the device while in utero, (2) took over from Robins the decision whether or not to recall the device, (3) concealed the fact that Robins had destroyed evidence, and (4) commissioned and then concealed the results of at least eight studies that showed defects in the device.

We held, in *Piccinin*, that the district court had four independent grounds on which it could stay the plaintiffs' suit against Aetna. Two of these grounds related to the fact that the plaintiffs in that suit sought damages out of the proceeds from the product liability insurance policy that Robins had purchased from Aetna. We found

that a stay was authorized under 11 U.S.C. § 362(a)(1)[1] because there was such identity between the debtor (Robins) and the third-party defendant (Aetna) that a judgment against Aetna would in effect be a judgment against Robins. We also found that a stay was authorized under 11 U.S.C. § 362(a)(3)[2] because Aetna might seek indemnification from Robins for any damages it had to pay, thus implicating the debtor's property.

We also found two equitable bases for the court's authority to stay the third-party suit. Both 11 U.S.C. § 105[3] and 28 U.S.C. § 1334[4] give the court general equity power to stay litigation that could interfere with the reorganization of the debtor. In addition to jeopardizing the debtor's property, we said, the litigation would adversely affect the reorganization because it would subject Robins' officers, directors, and employees to extensive discovery.

The appellants in the present cases have carefully drafted their complaints in an attempt to distinguish them from *Piccinin*. Appellant Oberg, who represents a group of 39 plaintiffs, and appellant Anderson, who represents a group of 4,007 plaintiffs, tried to sue Aetna for its actions in connection with the Dalkon Shield. Both

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[1] Section 362(a)(1) imposes an automatic stay of any proceeding "commenced or [that] could have been commenced against the debtor" at the time of the filing of the Chapter 11 proceeding.

[2] Section 362(a)(3) directs stays of any action, whether against the debtor or third parties, to obtain possession or exercise control over property of the debtor.

[3] Section 105 empowers the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *In re Otero Mills, Inc.*, 25 B.R. 1018 (D.N.M. 1982).

[4] Section 1334 grants the "inherent power of courts under their general equity powers and in the efficient management of the dockets to grant relief" by staying a third-party suit. *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983).

appellants sought recovery solely from Aetna's own assets and solely for Aetna's own actions. They also both agreed not to depose any of Robins' officers, directors, or employees without prior permission of the court. They anticipate that taped depositions currently available to them will be adequate to support their cause.

Anderson originally filed her suit against Aetna in federal district court in Kansas. That court dismissed her suit without prejudice in deference to the automatic stay provisions of 11 U.S.C. § 362(a). On October 7, 1986, Anderson sought permission from the Virginia district court hearing the bankruptcy petition to refile her suit in Kansas. On the same day, Oberg sought permission from the Virginia court to file an identical action in New Hampshire. The court refused to lift the stay in either case. It did not discuss any of the bases for the stay that we articulated in *Piccinin*. Instead, it noted that there was already a suit against Aetna for negligence, strict liability, breach of express warranty, fraud, civil RICO, and civil conspiracy. This suit, *Breland v. Aetna Casualty & Surety Co.*, 86-0315-R (E.D. Va.) requested certification of two classes, one composed of all Dalkon Shield claimants who have product liability suits now in court or who commence such suit within 36 months, and the other composed of all other persons with potential Dalkon Shield product liability claims.

The court ruled that both Anderson's and Oberg's suits were duplicative of *Breland*, and it therefore denied the relief requested. It dismissed the cases without prejudice, subject to refiling if the *Breland* matter did not fairly and adequately dispose of their concerns. The court has since conditionally certified the classes in *Breland*.

On January 13, 1987, Oberg filed with the court a second request to lift the stay on the ground that *Breland* does not adequately address her concerns. The court again denied the request, principally on the ground that it was premature.

II.

Aetna concedes that section 362(a)(1) is inapplicable in the present case because the complaints expressly exclude any recovery from Robins' insurance proceeds. Therefore, it cannot be said that there is such identity between the debtor and the third-party defendant that a judgment against Aetna would in effect be a judgment against Robins.

The appellants contend that section 362(a)(3) also is inapplicable because both New Hampshire and Kansas have adopted the doctrine of comparative negligence and generally do not permit contribution or indemnity among joint tortfeasors. *See, e.g., Hurley v. Public Service Company*, 123 N.H. 750, 465 A.2d 1217 (1983); *Consolidated Utility Equipment Services, Inc. v. Emhart Manufacturing Corporation*, 123 N.H. 258, 459 A.2d 287 (1983); *Mills v. Smith*, 9 Kan. App. 2d 80, 673 P.2d 117 (1983); *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978). Although Aetna contends that these cases do not fully resolve the issues of contribution and indemnity, we will assume, without deciding, that under both New Hampshire law and Kansas law, a suit against Aetna based solely on its own negligence would implicate no property of the debtor A.H. Robins and thus would not be precluded by section 362(a)(3).

Our examination of the equitable bases for a stay produces a contrary conclusion. Under section 105, the court has authority to issue any order "that is necessary or appropriate to carry out the provisions of this title." *In re Otero Mills, Inc., supra.* To enjoin a creditor's action against a codebtor under section 105, the debtor must show, *inter alia*, irreparable harm to the bankruptcy estate if the injunction does not issue. Because we have already determined that these actions pose no direct threat to Robins' property, we confine our analysis to other kinds of harm. In the context of this case, that harm would be the burden placed on Robins' officers, directors, and employees, which would exhaust their en-

ergies and thus interfere with the debtor's reorganization.

The appellants contend that there would be no burden on Robins because the plaintiffs have agreed not to depose any of Robins' officers, directors, or employees, or otherwise subject them to the costs of litigation. Although we applaud the plaintiffs' efforts to simplify and streamline the litigation, these efforts are not enough. Oberg and Anderson can agree not to impose any of the burdens of litigation upon Robins, but they cannot compel Aetna to follow the same hands-off policy.

Inevitably, Aetna must involve Robins in this litigation. Aetna's primary defense logically will be that Robins—not Aetna—is responsible for the injuries suffered by these plaintiffs, and that any detrimental actions taken by Aetna were on behalf of or at the direction of Robins. Under a system of comparative negligence, the trier of fact must determine Robins' relative fault in order to determine Aetna's relative fault. Despite the plaintiffs' good intentions, Robins will inexorably be drawn into this litigation. Because this involvement will put a substantial burden on Robins, it will detract from the reorganization process. We therefore hold that under section 105, the court had authority to stay these actions.

The appellants contend that there is a countervailing equity based on statutes of limitations. New Hampshire already has the longest statute of limitations in the country for this kind of action (6 years), and actions there could be barred by the delay of these suits. The appellants suggest that Aetna has refused to accept the notion that a bankruptcy stay tolls the state statutes of limitations. We have no authority, of course, to make determinations regarding New Hampshire or Kansas law. It is our view, however, that by seeking the protection of the court under the bankruptcy laws, Aetna implicitly waives its right to claim that this stay does not toll the

state statutes of limitations. Our system of law universally frowns on a party who would use the stay as both a sword and a shield.[5]

III.

In her second suit, Oberg requested that the court lift the stay on the ground that *Breland*, the class action against Aetna, did not adequately address her concerns. We agree with the court that this is premature.

"[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 812 (1985). Oberg has not yet been offered the opportunity to opt out of *Breland*, and we are unwilling to assume that when the opportunity arises, she will choose not to participate in the class action. Her decision at that date could be influenced by numerous factors, including the knowledge that if she chooses to opt out, she must still seek the permission of the court in bankruptcy in order to bring a separate suit in New Hampshire. We offer no opinion as to whether *Shutts* requires the court at that time to make available an alternative timely remedy to plaintiffs who "opt out" of the class.

The court below dismissed these suits without prejudice, subject to refiling if the *Breland* matter does not fairly and adequately dispose of their concerns. At this juncture, we believe that that decision best protects the interests of all parties. Therefore, we

AFFIRM.

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[5] The appellants also contend that Aetna is equitably estopped from arguing in favor of the stays in these suits because this is inconsistent with Aetna's actions in *Breland, supra.* The short answer to this is that there can be no equitable estoppel without detrimental reliance. *See, e.g., Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984). There is no evidence that the appellants relied on Aetna's conduct in such a manner as to change their position for the worse.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-2517

No. 87-2595

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor,

DONNA OBERG, *et al*,
Appellants,

versus

AETNA CASUALTY & SURETY COMPANY,
Appellee,

A. H. ROBINS COMPANY, INCORPORATED,
Debtor-Intervenor.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

ORDER

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell, with the concurrence of Judge Widener and Judge Chapman.

For the Court,

/s/ JOHN M. GREACEN
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Chapter 11
No. 85-01307-R
Retained Proceeding
(Judge Merhige)

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor,

EMPLOYER'S TAX IDENTIFICATION NO. 54-0486348

Adversary Proceeding
No. 86-1050-R

ALEXIA ANDERSON, *et al.*,
Plaintiffs,

v.

AETNA CASUALTY & SURETY COMPANY,
Defendant.

ORDER

For the reasons stated in the accompanying memorandum, the Court hereby ADJUDGES and ORDERS that plaintiffs' motion for relief from stay is hereby DENIED. This case stands dismissed without prejudice for the plaintiffs to refile under the circumstances outlined in the Court's memorandum.

Let the Clerk send a copy of this order and accompanying memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date Dec. 1, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Chapter 11
No. 85-01307-R
Retained Proceeding
(Judge Merhige)

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor,

EMPLOYER'S TAX IDENTIFICATION NO. 54-0486348

Adversary Proceeding
No. 86-1050-R

ALEXIA ANDERSON, *et al.*,
Plaintiffs,

v.

AETNA CASUALTY & SURETY COMPANY,
Defendant.

MEMORANDUM

This matter comes before the Court on plaintiffs' motion for relief from stay filed October 7, 1986. A. H. Robins Company, Incorporated ("Robins," "Debtor") filed its response on October 31, 1986. Aetna Casualty & Surety Company ("Aetna) then filed its response to plaintiffs' motion on November 6, 1986. The matter is now ripe for disposition.

Plaintiffs filed this motion in an effort to seek relief from the automatic stay so that they could proceed in a

civil action against Aetna, a co-defendant of Robins in this bankruptcy. The instant plaintiffs allege generally that Aetna, as the underwriter and liability insurer of the Dalkon Shield, was negligent, fraudulent, and a co-conspirator with Robins, and should thus be liable for additional money damages to the women who were allegedly injured by the Dalkon Shield.

Robins argues that this action should not be permitted to proceed in light of the United States Court of Appeals for the Fourth Circuit's ruling in *A. H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1985) where the court found that the automatic stay included Robins' co-defendants. Moreover, Robins argues that the *Breland* action, if allowed to proceed, would be dispositive of any issues in this matter. Aetna, although filing a separate brief, presents the same arguments as does Robins.

Plaintiffs argue in response to this opposition that *Breland* is not, and should not, be declared dispositive of their issues. They contend that since they did not join the plaintiffs in the *Breland* matter, they should not be forced to proceed in that same action.

While *Breland*, at present, is not dispositive of the issues presented by this motion, the Court has pending before it in that matter a motion to certify a class action. If Breland is so certified, it would appear that the instant plaintiffs might well be members of the certified class. Accordingly, the Court will deny the relief requested, and dismiss the case without prejudice, subject however, to refiling if the *Breland* case is not certified as a class action or if certified so as to permit opt out and plaintiffs choose to so do.

An appropriate order shall issue.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date Dec. 1, 1986

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Chapter 11
No. 85-01307-R
Retained Proceeding
(Judge Merhige)

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor,

EMPLOYER'S TAX IDENTIFICATION NO. 54-0486348

Adversary Proceeding
No. 86-1049-R

DONNA OBERG, *et al.*,
Plaintiffs,

v.

AETNA CASUALTY & SURETY COMPANY,
Defendant.

ORDER

For the reasons stated in the accompanying memorandum, the Court hereby ADJUDGES and ORDERS that plaintiff's motion for relief from stay is hereby DENIED. This case stands dismissed without prejudice for the plaintiffs to refile in the event the *Breland* matter, CA

86-0315-R, does not adequately and fairly resolve their concerns.

Let the Clerk send a copy of this order and accompanying memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date Dec. 1, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Chapter 11
No. 85-01307-R
Retained Proceeding
(Judge Merhige)

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor,

EMPLOYER'S TAX IDENTIFICATION NO. 54-0486348

Adversary Proceeding
No. 86-1049-R

DONNA OBERG, *et al.*,
Plaintiffs,

v.

AETNA CASUALTY & SURETY COMPANY,
Defendant.

MEMORANDUM

This matter comes before the Court on plaintiff's motion for relief from stay filed October 6, 1986. A. H. Robins Company, Incorporated ("Robins," "Debtor") filed its response on November 12, 1986. The plaintiffs then filed a supplemental memorandum on November 14, 1986. The matter is now ripe for disposition.

Twenty-six plaintiffs from New Hampshire filed this motion in an effort to seek relief from the automatic stay so that they could proceed in a civil action against the Aetna Casualty & Surety Company ("Aetna"), a co-defendant of Robins in this bankruptcy. The instant

plaintiffs allege generally that Aetna, as the underwriter and liability insurer of the Dalkon Shield, was negligent, fraudulent, and a co-conspirator with Robins, and should thus be liable for additional money damages to the women who were allegedly injured by the Dalkon Shield.

Robins argues that this action should not be permitted to proceed in light of the United States Court of Appeals for the Fourth Circuit's ruling in *A. H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1985) where the court found that the automatic stay included Robins' co-defendants. Moreover, Robins argues that the *Breland* action, if allowed to proceed, would be dispositive of any issues in this matter. Aetna, although filing a separate brief, presents the same arguments as does Robins.

Plaintiffs argue in response to this opposition that *Breland* is not, and should not, be declared dispositive of their issues. They contend that since they did not join the plaintiffs in the *Breland* matter, they should not be forced to proceed in that same action.

While *Breland*, at present, is not dispositive of the issues presented by this motion, the Court has pending before it in that matter a motion to certify a class action. Recognizing that the stay has been lifted in *Breland* so that certain people can investigate the viability of Aetna's liability to both Robins and the individual claimants, the Court finds this proceeding duplicative at the instant time. Accordingly, the Court will deny the relief requested, and dismiss the case without prejudice, subject however, to refiling if the *Breland* matter does not fairly and adequately dispose of the instant plaintiffs' concerns.

An appropriate order shall issue.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date Dec. 1, 1986

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Chapter 11
No. 85-01307-R

Retained Proceeding
(Merhige)

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor,

EMPLOYER'S TAX IDENTIFICATION NO. 54-0486348

Adversary Proceeding
No. 87-1001-R

DONNA OBERG, *et als.*,
Plaintiffs,

v.

AETNA CASUALTY & SURETY COMPANY,
Defendant.

ORDER

For the reasons stated from the bench, the Court hereby ADJUDGES and ORDERS that plaintiff, Donna Oberg's ("Oberg") motion to lift the automatic stay is DENIED.

Let the Clerk send a copy of this order to all counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date April 15, 1987

TRANSCRIPT OF PROCEEDINGS

Dated April 11, 1987

[17] THE CLERK: Clerk item number 2, adversary proceeding number 87 1001 R., Donna Oberg, et al. v. Aetna Casualty and Surety Company.

Motion of the plaintiffs for entry of an order granting relief.

MR. McDOWELL: Good morning, Your Honor, Joseph McDowell from Manchester appearing on behalf of the movants, Donna Oberg, et al. Your Honor, I have a memorandum of law that I was hoping would have been filed with the court on Thursday. I circulated a copy to all counsel, but unfortunately I was not able to get Mr. Proffit's signature as local counsel and filed with the court. I don't expect the court to read it this morning.

THE COURT: We won't have time.

MR. McDOWEL: I am sorry it wasn't here.

THE COURT: In the future, when that happens, go ahead and send a copy. At least we will have that in advance, you see.

MR. McDOWELL: I am sorry. My experience has been if I didn't have local counsel, I was reticent to file it with the court, that is all. I am sorry. In the future that is what I will do. The memorandum isn't much different than the brief that I filed with the Fourth Circuit on what I call Oberg one, and we sent a copy of that brief to the court, although I am sure the court—

[18] THE COURT: Bring me up to date now. Oberg. Tell me.

MR. McDOWELL: I represent Donna Oberg and 26 other women, plus their husbands, in the state of New Hampshire. Donna Oberg was one of 11 women that I represented who had a law suit pending against A. H. Robins when this bankruptcy order was filed. She is a 26-year old woman who at that time—she is now in her 30's, but at the time had a total hysterectomy.

THE COURT: Once more, and then I won't interrupt again.

Had we heard this before? Was there an effort made? I mean, are we going over ground that we have already covered?

MR. McDOWELL: I hope not, Your Honor. This Oberg was certainly the subject of a motion that I filed previously. We did not have a hearing. But prior to the Breland order this court issued an order that you denied, dismissed the motion without prejudice for the plaintiffs, and I am quoting, to re-file in the event the Breland matter, setting the docket number, does not fairly resolve their concerns.

I filed an appeal on Oberg one. I told the Fourth Circuit that I filed this motion called Oberg two with this court. I don't want that to waste a lot of time, because I [19] know everyone in the court feels it would waste enough of its time; however, I will say that we are not participating in Breland. We feel that it does not fairly represent our concerns in this respect, and we have filed this second motion. And this is really my first opportunity to argue Oberg before this court.

I will get right to it. The Fourth Circuit once again notes about this issue of filing one here, and the Fourth Circuit doesn't know—the Fourth Circuit knows, and now the court knows about our appeal. I think things are different because the court entered the order in Breland and had made the stay with regard to Aetna to some degree.

And I would ask the court to take judicial notice of its file on Breland versus Aetna. And I would point out to the court that when Breland was filed it was filed in Minnesota, including both Aetna, Robins, and a number of individual defendants as defendants in Minnesota.

Subsequently those, some of those defendants, except for Aetna, were released, now removed from that action, and that action was transferred to this court sometime in April or May of 1986.

THE COURT: Who represents Breland?

MR. McDOWELL: I believe Mr.— I am not sure of his name, but I believe Mr. Friedberg.

THE COURT: That is the Friedberg group it has has [20] come to be known.

That is the class action?

MR. McDOWELL: That is what I understand, Your Honor.

THE COURT: Okay. All right.

MR. McDOWELL: You—I am sorry. Yes, Your Honor, that is.

That action was transferred to this court. Neither Aetna nor Robins moved to stay or stop that proceeding. That was a matter at that time was the subject of pretrial hearings, according to the docket sheet in that matter. I have copies of it here.

It was subject to some hearings in this court. Some discussions about filing proposed orders with regard to a class action. Some amended complaints filed with this court. At no time did Robins or Aetna ever move to hold those lawyers in contempt, ever seek to impose the automatic stay as a defense to that action, ever ask this court to enjoin it.

Our position is that we have cited it in a memoranda I submitted to this court—this will be handed in today—is Aetna and Robins do not have a right to assert the stay against Oberg under those circumstances.

I am not going to argue the Picinnin arguments with the court again. You made the ruling numerous times, and I do not mean to be disrespectful to the court.

[21] My only point with regard to this case is that they do not have a right to pick and choose as to which plaintiffs can go forward, Friedberg and his group are going forward, and that is fine.

THE COURT: All of you were represented in that class action.

MR. McDOWELL: Well, I am not—

THE COURT: Now, in fairness, you may have an opportunity to opt out, because the court hasn't certified it as to mandatory class, but the fact of the matter is at this moment everybody is represented. All of the claimants are represented in that action.

MR. McDOWELL: Well, it is our feeling, though, that we are not.

THE COURT: Well, you mean you don't feel that they are adequately represented.

MR. McDOWELL: I don't know Mr. Friedberg, so I wouldn't say. My point is, we are not participating, we don't know what is going on. We feel it will be an opt out class. We want to go forward in the state of New Hampshire, which has the longest statute of limitation in this country, which we believe is an important issue, as this court knows. Aetna and Robins want to impose a two-year statute in this case.

THE COURT: They don't run the show.

[22] MR. McDOWELL: I don't know that they don't. We all know that, Your Honor.

I mean that sincerly.

And I am hopeful the court will not allow them to impose a two-year statute, but the point is that Robins and Aetna do not have the right to use this injunction as an offensive weapon to forum shop. They are basically forcing every one to try their cases in Virginia.

Now, we are from New Hampshire. We want our cases heard in New Hampshire. I don't represent anyone other than 27 ladies from New Hampshire.

THE COURT: You want whatever claim you have against Aetna.

MR. McDOWELL: That is right. This court when it modified the order with regard to Breland said Robins was to be left out, the officers were to be left out; and I think the court has a right to do that, and in fact snould do that. That is all I am asking for in New Hampshire. I would like to get—New Hampshire law is probably the most liberal with regard to this type of

case in the country. I am not an expert, but I know no state has a longer statute than six years. New Hampshire would impose a six-year statute with regard to every plaintiff who filed in New Hampshire. They treat the statute of limitation as a local rule, a United States Supreme Court case on that, Keeton v. [23] Hustler Magazine.

New Hampshire doesn't allow contribution among joint tort-feasors. They follow the rule that it is joint and several liability. If we were to show Aetna was negligent at all, and our plaintiffs were free from negligence, we would be able to recover whatever verdict we could get against Aetna, entirely against Aetna without reference to Robins. And this brings me to the most important point, and I can't understand it. And I would ask this court—it is improper to ask the court a question, so I don't expect a response, but I would ask Robins to tell us today the answer to this question. You can't tell me that if Robins isn't waiting for a white knight to save them, that is what we are hoping for, that is what we are looking for, and if someone gives them a billion dollars to help bail out of it, why don't they want it?

Plaintiffs' lawyer says, let us go against Aetna. Let us at them anywhere we can. They were not entitled to the bankruptcy stay. What do they need protection for? They are a 2 hundred billion dollar company. We want right at them, right, wrong or indifferent. We will take our chances. Robins says, no. Why? There is no reason in logic why they don't want us to go against Aetna, unless there is a deal struck that we don't know about. It makes no sense. And with respect to Your Honor, I would ask [24] Robins and Aetna to stand up here and tell us why Robins doesn't want us to go after Aetna or any other defendant in this case.

It can't help but help them. They want to survive.

THE COURT: Mr. McDowell, if they wish to respond, that will be fine, but I think they have responded half a dozen times.

MR. McDOWELL: Responded they don't want to us to go after Aetna.

THE COURT: And why.

MR. McDOWELL: Well, Your Honor—

THE COURT: Go ahead.

MR. McDOWELL: This is my first time. This is my first time standing up here. No one is putting anything over on you. I am convinced that Your Honor has run the case.

THE COURT: Despite the efforts.

MR. McDOWELL: Despite the efforts. No question.

THE COURT: Thank you.

MR. McDOWELL: I knew that coming down here, so I mean no disrespect to Your Honor at all, but the question has to be asked. We think we can get some money out of Aetna. It seems to me if I were Robins and I were in bankruptcy I could use some money. I have got a lot creditors, more creditors than I have money, I think.

[25] THE COURT: Let me just suggest this to you.

You have the, I assume you have the right to bring this motion. I am sure you do.

One, the court is satisfied that the class is adequately represented by counsel.

Two, the court has made no decision as to whether it it is going to be an opt out class, although, you seem to be fairly alert as to class actions and you may well have already told us the answer, but, it hasn't been done so officially.

I honestly do not know what is going on in that case, except discovery of some sort, because I think there is something here today in connection with that.

MR. McDOWELL: That is right.

THE COURT: But your opportunity, as you put it, to go after Aetna has not been foreclosed as yet, Mr. McDowell. I want you to know that.

MR. McDOWELL: I realize that. But my point is this with regard to Robins, we can't fool around with

the bankruptcy proceedings at all. I understand that. Don't want to bother their officers or anything, but why is Aetna entitled, and why don't they want us to go after it, let us all go after. I don't understand why they want to stop us from going after Aetna or anyone else, because it only makes sense to me that it would help Robins. And I don't believe [26] they can stand up here and give us a real good reason why they don't want us to go after them. And that bothers me. I understand they don't want it. I have got that imprinted on my head. I am a Baker defendant. I understand that, I got the message. I filed a motion. I have bothered them and I know they don't like it. But I have to say that the—it is curious that they don't want all of these defendants pursued. I understand why they might want us all in Virginia. I can understand the court's concern about that. I respectfully disagree, but I can understand it, the court's concern about it. But I don't understand why it is not—

THE COURT: Can you understand what would happen if we had a hundred thousand law suits by individual people against Aetna during the pendency of this bankruptcy? Don't you have a real gut feeling as a trial lawyer that you might have to call on some of the Robins people as witnesses?

MR. McDOWELL: We can't. I think we could rely on the discovery that has already been done on this issue, Judge, court-appointed matters. I believe a judge in Minnesota who did the same thing. If we are unwilling to understand that, it is just too bad for us, that we can't bother Robins people. But Aetna, with due respect, is not entitled to any protection whatsoever. It is Aetna's problem, as well as ours, but more importantly I think New [27] Hampshire is an exception, one exception state in the country. That may sound bizarre from somebody up in the woods that I found the pot of gold in my own back yard, but true and honest we have the six-year statute, and we have those portions of the law which I cited to

the court. So I say the court should lift the stay and allow us to proceed in New Hampshire with our six-year statute.

Thank you, Your Honor.

THE COURT: Thank you.

MR. CROCKETT: Your Honor, I will be brief. I don't want to rehash everything that was said on the subject before, but I believe some of Mr. McDowell's points deserve a response, and I will do the best I can to give him one.

First off, the Breland class action: Breland was in this court when we first learned of it. It had been transferred down here. All of the things that we heard about twice this morning happened prior to Robins having knowledge of it. Right, wrong, or indifferent it has always satisfied me as Robins counsel that once an action is in this state, in this court in front of Your Honor, then they can file their pleadings, we can handle it on a motion to lift the stay. However the pleadings could get styled, they are in the right court in front of the right judge, and we will take on the substance and leave that aside. And Breland is here. Breland also is a potential class action [28] on behalf of everybody, and not an action on behalf of 27.

As pleadings presently stand, as I believe the class is defined in terms of participation in this bankruptcy, that is the critical link.

It should not say—I think it is little inconsistent to say we don't want to go, don't want to see people try to collect from Aetna, but we want Breland to go forward. Breland, right now, provides the only linkage that we know of, and I think linkage is important if there is going to be true benefit to any proceeding, out of proceedings against Aetna. Your Honors are lassoed upon the fact that it is the people at Robins who would be asked to testify in hundreds of thousands of actions across the country, potentially. And whereas Mr. McDowell would be willing to allow us to rest upon evidence

already collected, I don't know if Mr. Street and Aetna are going to be willing to go along with that. So you have that complication in there.

As long as that circumstance is extant, then we have —need the preliminary injunction, and we intend to enforce it. In this particular instance, nothing has really changed that much since Oberg one, as far as I know.

THE COURT: You intend to seek enforcement?

MR. CROCKETT: Pardon me?

THE COURT: You intend to seek enforcement of it?

[29] MR. CROCKETT: Yes, sir, we do. This is not an instance of enforcement, because we filed this motion. Oberg two doesn't represent a major change from Oberg one, because the Breland action is continuing. I think it is premature to say whether that Aetna can fairly address their concerns, because, like I say, it is pretrial discovery that is going on. I don't think anybody at this time can answer those questions. So I think we ought to be a little more patient. That is all I have.

THE COURT: All right.

Mr. Street, do you have anything to say?

MR. STREET: I think it has been, Your Honor.

Scott Street on behalf of the Aetna Casualty and Surety Company. I think our position has been accurately stated by Mr. Crockett.

THE COURT: Let me ask you. Don't we have a pretrial coming up on that case in the not too distant future?

MR. STREET: Within several months, I believe, Your Honor. There has been one scheduled. Discovery is proceeding at this time.

THE COURT: Primarily on class action aspect of it, I take it.

MR. STREET: Well—

THE COURT: Or combination.

MR. STREET: Discovery on the class action.

[30] THE COURT: Discovery on aspects of the class action.

MR. STREET: Aspects solely with respect to that. There has been a voluntary agreement not to involve, I believe by the plaintiff's counsel, not to involve any Robins people. They are limiting their discovery to the Aetna portion at this time.

THE COURT: All right. All right, sir.

MR. McDOWELL: Real quick, Your Honor. I understand the court's order in Breland, but you lifted the stay providing they leave Robins people alone. My reading of it. Two, the class certifications on Breland had not been done when we filed Oberg one, or when we came in here on September 4, 1986 for the hearing. And last, but not least, there is another instance where Aetna did not seek to impose a stay, and that was, I don't remember the name, but there was a lawsuit by lawyers in California, for fees arising out of Robins defense. They didn't seek to impose a stay on that either. So I say regardless of the rightness or wrongness of it, these defendants have what I have had, the right to impose the stay on Aetna actions because of their waiver and estoppel, and just choosing as to who they want.

Thank you very much.

THE COURT: Thank you.

Thank you, Mr. McDowell.

MR. McDOWELL: Thank you.

[31] THE COURT: I don't think the situation has changed any. We have got to deny your motion. I might say this to you, though. I wouldn't give up on the thought that you may have your opportunity as soon as the court decides if it is an opt out. Then, go get them.

MR. McDOWELL: Thank you very much, Your Honor.

THE COURT: Thank you, sir.

APPENDIX F

THE PARTIES BELOW

The parties plaintiff in Oberg, et al v. Aetna Casualty & Surety Company (Adversary Proceeding No. 86-1049-R) were:

Janice & Daniel Belcher
Susan & David Belcher
Nancy Benson
Jean & John Boeckeler
Janet Bruce
Melody Cannon
Barbara L. and David W. Carr
Helen Carty
Victoria Charnock
Marion Duford
Deborah and John Fallon
Janet and Frank Gregory
Sarah E. Haskell
Pamela Hockenhull
Patricia Johnson
Mary H. Jordan
April Weeks and Leonard Korn
Beverly McClure
Elaine Nizza
Donna Oberg
Jeanne & Paul Robey
Pamela Saxby
Shelley and Howard Shapiro
Sharon Lee Spern
Jeannette Sweet
Donna and Nicholas Tshanakas
Daphne Whitmore

* * * *

The parties plaintiff in Anderson, et al v. Aetna Casualty & Surety Company (Adversary Proceeding No. 86-1050-R) were:

Alexia Anderson
Frederick Anderson

Barbara Anderson
Philip Anderson
Paula C. Bannow
John Bannow
Diana Beard
Robert Davis Beard
Sherry Bergman
Charles Bergman
Marsha Brown
Starris Brown
Charles Brown
Jeannette Bulinski
Gregg Gundersen
Wendy Busch
Ingrid Carter
Paul Gene Carter
Lillian Castillo
Elizabeth Chamberlayne
Carol Cooke
Donna Cornelisse
Denise Crowell
Mike Crowell
Jacki Dasso
John Thompson
Sharon Ebert
Dennis Ebert
Laura Bein Emerson
Gary S. Emerson
Carol Evans
Dennis S. Evans
Melinda Evans
Hawley Roger Evans
Carla Magdanz Everett
Barbara Ferguson
Charles Ferguson
Nancy C. Franz
Roger A. Franz
Julia Block Frey

Janette Gamet McMahon
George McMahon
Carmen Graham
Ronald Graham
Xenia D. Graves
Cheryl Gruse
Roberta Guildner
Ava Hamilton
Delmar Hamilton
Dolores M. Haro
Lori Haugland
Mary Hein
William Hein
Janet Heitzmann
Mary Frances Hilko
Kathleen Jackson
Lucy Judson
Craig Alan Yeager
Betty A. Kenzel
Richard Edward Kenzel
Judy Kurtz
Judith Lavezzi
Susan Leuthauser
Truman Leuthauser
Harriet Elizabeth Mann
Sharon L. Mazotti
Daniel Mazotti
Sandra Roberts Merrill
Roy R. Merrill
Laurel Ruth Mifflin
John Mifflin
Nathan Mifflin
Sandra Diane Miller
John K. Miller
Peggy Morgan
Barbara T. Nowak
Mary Ann Perkins
Russell Perkins

Ravonda Lou Potter
Roger Jay Potter
Kathy Quinton
Judy Ramsay
Charles Edward Ramsay
Pamela Reiter
Peter Reiter
Ella Ruth Rogers
Elaine Rogers
Donis Rogers
Rebecca Seckinger
Christine Seiffert
Stefanie Selden
Judith Sheppard
M. Lee Sheppard
Jessica Simkulet
Janet Singletary
Robert Singletary
Evelyn M. Snyder
Andrew Snyder
Marcia Steel
Mary Stewart
Charles David Stewart
Karon Tiger
Thelma Lynn Tilman
Durcille Trolinger
Jo Susan Verspohl
Carol Waltz
Ronald F. Waltz
Kathleen Ann Watson
Larry Watson
Abby Weinstein
Barry Weinstein
Diane D. West
Martha Whitehead
Marilyn Wilson
Vicki Woodard

Tom George
Deirdre Zietz
Leonard Eugene Zietz

Katharine K. Beattie
Fareda E. Belcher
Floyd M. Belcher
Vicki Brown
Randy Brown
Estate of Juanita Lynn Brown
Beverley C. Davisson
William A. Davisson
Jason William Davisson
Mary Ann Evertson
Robert W. Evertson
Sandra L. McDonald
Shirley Marie Burroughs (Luetke)
Robert Burroughs
Amy Marie Hutton
Patty E. Hutton
Leon D. Hutton
Anna Louise Luhman
Sarah Elizabeth McLeod Kirk (McInnis)
David Casey McInnis
Billie Rae Mercer
Sandra J. Mertens
Ronald G. Mertens
Judith A. Nechols
James R. Nechols
Gaylene P. Schommer
John W. Schommer
Rachel Hummel Scott
David L. Scott
Nancy J. Taylor
Patricia Ann Tronsgard
Joyce Frieders
Charles D. Frieders
Heather Lillian Hull

Kenneth L. Hull
Roberta Christine Martin
Keith A. Martin
Kerstin Nordahl Males
William Males
Betsy Ann Munson
Kathleen Gay Pope
Rita Raaf
Richard Raaf
Courtney Leigh Raaf
Janet L. Scott
Fay Annetta Smith
Sonja Gretchen Sweek
Mary Ann Thomas
Steven J. Thomas
Sharon C. Angel
Gene R. Andel
Debra Gail Dean
Rhonda Jan Smith
Catherine L. Woods
Joda Donnett Doudna Wright
Patricia Byers Gilbert Graber
Kay M. Kincade
Paul W. Kincade
Johnsie Charles Brown
Joe T. Brown, Jr.
Charlotte S. James
Elizabeth E. Tomaszewicz
George R. Tomaszewicz
Rebecca L. Adair
Gary A. Adair
Linda M. Black
William R. Black
Mary Augusta Bonner
Robert I. Bonner
Patricia J. Heuseveldt
Ronald W. Heuseveldt
Elizabeth W. Rinehart

Richard R. Rinehart
Janice A. Sell
Steven K. Sell
Peggy A. Sneegas
Roger A. Sneegas
Bonlyn Kulick

Nadine K. Boyles
Kathleen J. Briley
Elizabeth and Osborne Castle-James
Rose M. Clark
Cecelia L. Cosner
Mara Crees
Charlotte M. and Donald R. Crosly
Karen L. Cusmano
Barbara A. DeMonte
Lynda C. Donato
Althea D. Flowers
Shiela and Herb Friedberg
Deborah A. Hinebaugh
Janice K. and Norman C. Hoffa
Yvonne C. Jeffers
Dorothea M. and Thomas Johnson
Karen E. and Robert B. Karnes, Jr.
Helen Jean Kipp
Judy I. and Darrel J. LaCanne
Christine E. Lee
Judith Alice McCauley
Jean S. Miniard
Isabel Pasqualino
Nancy S. and Shannon A. Perry
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Diane Joan Henderson
Brent Ralph Henderson
Kathleen Hordon
Richard Hordon
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Donald S. Hutchinson
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Janice Benton
Issac Benton
Prudence Beckh
Deborah Brady
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Dian Candelaria
Beth Caskey
David Caskey
Baby Girl Caskey, deceased
Mary A. Collins
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Pamela Craig
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Thomas Guinn
Baby Guinn, deceased
Sharon Hall
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Vicki R. Johnston
Bryan Johnston
Sonia James
Antonio James
Baby James, deceased
Susan M. Killian
Diana C. Killorin
Corine Lazaro
Richard W. Lazaro
Maria R. Leyva
Lorenzo Leyva
Baby Leyva, deceased
Baby Leyva 2, deceased

Jill Lindgren
Baby Lindgren, deceased
Floraida I. Lucero
Pauline Y. Lucero
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Baby McClain, deceased
Christine Mather
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Lee Murphy
Janet Ortiz
Raymond R. Ortiz
Baby Boy Ortiz, deceased
Mary M. Payne
Joe R. Payne
Baby Boy Payne, deceased
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No. 87-1208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONNA OBERG, *et al.*,
Petitioners,
v.
THE AETNA CASUALTY & SURETY CO.
and A. H. ROBINS CO.,
Respondents.

ALEXIA ANDERSON, *et al.*,
Petitioners,
v.
THE AETNA CASUALTY & SURETY CO.
and A. H. ROBINS CO.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this Chapter 11 reorganization, the Court of Appeals had previously reviewed and affirmed the reorganization court's decision to enjoin preliminarily the prosecution of certain third-party litigation found to be "related to" the reorganization. *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 251 (1986). Did the reorganization court abuse the discretion conferred upon it by the broad grant of equitable powers under Section 105(a) of the Bankruptcy Code when it subsequently denied petitioners' request to be relieved from that injunction so as to be permitted to institute "related to" litigation in another forum where 1) the effect of allowing such litigation would be to disrupt the debtor's effort to reorganize, and 2) the petitioners' litigation interests were being protected *ad interim* in a class action being supervised by the same district judge?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1208

DONNA OBERG, *et al.*,
Petitioners,

v.

THE AETNA CASUALTY & SURETY CO.
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT BRIEF IN OPPOSITION

Respondents A. H. Robins Company, Incorporated ("Robins"), and The Aetna Casualty and Surety Company ("Aetna")[1] respectfully submit this joint brief in

[1] As required by Rule 28.1 of the Rules of the United States Supreme Court, Robins states that its subsidiaries, not wholly owned, are: Lee Laboratories, Incorporated, Riddick Communica-

opposition to the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in *In re A. H. Robins Co.*, 828 F.2d 1023 (4th Cir. 1987). For the reasons set forth below, the petition should be denied.

STATEMENT OF THE CASE

This petition arises from the reorganization case of Robins, under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* As observed by the United States Court of Appeals for the Fourth Circuit, Robins sought relief under Chapter 11 because it was

> [c]onfronted, if not overwhelmed, with an avalanche of actions filed in various state and federal courts throughout the United States by citizens of this country as well as of foreign countries seeking damages for injuries allegedly sustained by the use of an intrauterine contraceptive device known as the Dalkon Shield.

A. H. Robins Co. v. Piccinin, 788 F.2d 994, 996 (4th Cir.), *cert. denied*, 107 S. Ct. 251 (1986) (hereinafter cited as *Piccinin*).

With the filing of Robins' voluntary petition on August 21, 1985, the automatic stay of 11 U.S.C. § 362(a) barred the commencement or continuation of any suit for prepetition claims against Robins, including all Dalkon Shield suits. Under the circumstances attendant to this unique Chapter 11 case, however, the automatic stay did not provide Robins with the "breathing spell" from such suits required to facilitate the reorganization. Suits against other persons and entities associated with the Dalkon

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tions, Eurand Italia, S.p.A., Eurand International, S.r.l., Eurand Microencapsulation, S.A., Eurand de Mexico, S.A. de C.V., Phariab Industrial Company, A. H. Robins Farmaceutica, S.A., Pharco Laboratories, Ltd., and A. H. Robins-Showa Co., Ltd. Aetna is affiliated with Aetna Life & Casualty Co.

Shield—such as hospitals, doctors, medical supply houses, and Aetna, Robins' liability insurer—continued unabated.

As the sole manufacturer of the Dalkon Shield, Robins necessarily is involved in every suit claiming injury relating to the manufacture, marketing and use of the Dalkon Shield. Therefore, unlike situations surrounding the asbestos litigation and the associated bankruptcy cases in which many firms manufactured the products involved, continuation of the Dalkon Shield litigation directly threatened to impede Robins' reorganization effort. The decade of Dalkon Shield litigation preceding the Chapter 11 case taught that, at a minimum, Robins inevitably would become involved in discovery aimed at its officers and employees who had been associated with the Dalkon Shield. At the worst, Robins faced new claims for indemnity or contribution from these defendants.

The United States District Court for the Eastern District of Virginia, the Honorable Robert R. Merhige, Jr. presiding ("the District Court"), remedied this extraordinary situation with appropriately tailored relief. On October 11, 1985, the District Court entered its preliminary injunction order restraining the continuation of eight classes of Dalkon Shield actions against third parties that traditionally had been named in Dalkon Shield actions as co-defendants with Robins ("the Preliminary Injunction Order"). Appendix ("App.") at 1a-9a. One such class of actions, represented by the case of Anna Piccinin, comprised suits against Aetna "under theories of conspiracy, fraud, negligence, misrepresentation and breach of warranty." Ms. Piccinin appealed the Preliminary Injunction Order to the Fourth Circuit, which affirmed the District Court. *Piccinin*, 788 F.2d 994 (4th Cir. 1986). This Court denied her petition for further review by writ of certiorari. 107 S. Ct. 251 (1986).

On August 9, 1986, approximately 200 plaintiffs, all of whom are claimants in the Chapter 11 case, commenced an action in the United States District Court

for the District of Kansas, styled *Anderson, et al. v. Aetna Casualty & Surety Co.* ("the Anderson Action"). On August 21, 1986, the complaint in the Anderson Action was amended to add almost 4,000 additional plaintiffs. Again, each of the individuals added was simultaneously pressing a Dalkon Shield claim against Robins in the Chapter 11 case.

As stated in the Petition, the claims against Aetna in the Anderson Action attempted to associate Aetna with alleged wrongdoing with respect to the Dalkon Shield and the defense of actions against Robins in the prepetition period. *See* Pet. at 4. Aetna, of course, denies these allegations.

The Anderson Action was dismissed by the parties shortly after its filing, pursuant to the terms of consent orders in which the plaintiffs acknowledged that they were required first to obtain relief from the Preliminary Injunction Order before filing any similar action.[2] At this juncture, the plaintiffs in the Anderson Action split into three groups: (1) a group of roughly 1,400 claimants ("the Anderson claimants") who sought leave to refile the Anderson Action in the Kansas court, (2) one group of 26 claimants ("the Oberg claimants") who sought relief from the Preliminary Injunction Order to file an identical complaint in New Hampshire under the caption *Oberg et al. v. Aetna Casualty and Surety Co.*,

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[2] An example of the consent orders signed by counsel for all 4,200 plaintiffs in the Anderson Action is included in the appendix to this brief at 10a-12a. In these consent orders, each attorney acknowledged that he understood

> that he or anyone else by reason of this Court's Orders may not file any other suit or action arising from or related to the Dalkon Shield without first obtaining from the United States District Court in Richmond relief from the Stay and this Court's Preliminary Injunction Order dated October 11, 1985, or other such appropriate order from this Court expressly permitting the filing of such suit or action.

App. at 11a.

and (3) an even larger group of nearly 2,500 claimants who have not pursued the matter since the dismissal of the Anderson Action.

The District Court denied the requests of the Anderson claimants and the Oberg claimants for relief from the Preliminary Injunction Order, relying on the Fourth Circuit's affirmance of that order in *Piccinin*. The District Court also observed that a complaint seeking a class action against Aetna on behalf of all Dalkon Shield claimants, *Breland, et al. v. Aetna Casualty & Surety Co.* ("the Breland Action") had been lodged with it and was under consideration. If certified as proposed, the class in the Breland Action would encompass all of the Anderson claimants and the Oberg claimants. Based on these observations, the District Court expressly declared that its denial of the requests for relief from the Preliminary Injunction Order was without prejudice to the movants' right to refile their motion if the Breland Action "did not fairly and adequately dispose of their concerns." 828 F.2d at 1025. Both the Oberg and Anderson claimants appealed.

Drawing upon its seminal decision in *Piccinin*, the Fourth Circuit affirmed both rulings by the District Court. *In re A. H. Robins Co.*, 828 F.2d 1023 (4th Cir. 1987) (*"Oberg"*). Whereas the *Piccinin* opinion had exhaustively reviewed all the grounds supporting the full sweep of the Preliminary Injunction Order's reach, the court in *Oberg* focused exclusively on suits against Aetna in a role other than Robins' liability insurer. Holding fast to *Piccinin*, the Fourth Circuit held that the District Court's restraint of these claimants' proposed suits against Aetna was an appropriate exercise of its authority granted by 11 U.S.C. § 105.

As the Fourth Circuit first opined in *Piccinin*, Section 105 empowers a bankruptcy court to enjoin actions against non-debtors upon a showing that the prosecution of such actions "might interfere in the rehabilitation

process . . . ." *Piccinin*, 788 F.2d at 1003. As applied to the instant preliminary injunction, that interference is the product of "the burden placed on Robins' officers, directors, and employees, which would exhaust their energies and thus interfere with the debtor's reorganization." *Oberg*, 828 F.2d at 1026. Contrary to Petitioners' assertion that their proposed actions "will have no conceivable adverse financial impact on the estate of the debtor Robins," Pet. at 20; *see also id.* at (i), 9, the Fourth Circuit recognized that such interference with the reorganization effort could have a fatal financial impact on Robins.

Although the Anderson and Oberg claimants pledged that they would not involve Robins and its personnel in discovery or other aspects of their proposed cases against Aetna, this offer does not provide Robins adequate protection: "Oberg and Anderson can agree not to impose any of the burdens of litigation upon Robins, but they cannot compel Aetna to follow the same hands-off policy." *Id.* at 1026. To the contrary,

> Aetna must involve Robins in this litigation. Aetna's primary defense logically will be that Robins—not Aetna—is responsible for the injuries suffered by these plaintiffs, and that any detrimental actions taken by Aetna were on behalf of or at the direction of Robins.

Id.[3] In any event, Aetna's intention to seek discovery from Robins and otherwise involve Robins' personnel in these actions, if permitted, is a matter of record.

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[3] The Fourth Circuit also observed that under the comparative negligence law of Kansas that would apply in the Anderson Action, Aetna must affirmatively prove Robins' percentage of the alleged fault. *Id.* The 26 Oberg claimants, however, argue that this observation demonstrates the error in the opinion because New Hampshire law has no "comparative negligence" standard. This response misses the point. If the doctrine of comparative negligence is inapplicable, then Aetna must shift to Robins all, not part, of the blame.

REASONS FOR DENYING THE WRIT

This case presents no important or novel question, nor does it involve application of the law in a manner inconsistent with opinions of this Court or other courts of appeals. Rather the issues are fact-specific and involve the District Court's discretionary use of its equitable powers, consistent with applicable law, to protect the debtor from involvement in potentially overwhelming litigation.

A. The interpretation placed upon Section 105(a) of the Bankruptcy Code by the reorganization court and by the court of appeals recognizes, correctly, the limitations of that grant of equitable powers and merely reflects a fact-specific exercise of such powers in the unique circumstances of this complex reorganization.

As it must, Petitioners' argument begins with an attack upon the propriety of the *Piccinin* decision upholding the preliminary injunction. In *Piccinin*, the court of appeals enumerated five bases for the Preliminary Injunction Order including the "all writs" provision of the Bankruptcy Code, Section 105(a).[4] In its decision denying Petitioners' request to be excepted from the Preliminary Injunction Order, the Fourth Circuit reaffirmed that Section 105(a) permits such an injunction under appropriate circumstances.[5] As shown below, this decision comports with Section 105's legislative history and the existing case law.

Although Petitioners contend that the Preliminary Injunction Order cannot be squared with the legislative

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[4] "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105.

[5] Petitioners' salvo directed at the portions of *Piccinin* relating to the automatic stay of 11 U.S.C. § 362 need not be returned. Petition ("Pet.") at 11-12. The parties and the courts below agreed that this aspect of the Preliminary Injunction Order rests upon Section 105. The Fourth Circuit specifically reserved any question of the availability of contribution or indemnity against Robins and the applicability of 11 U.S.C. § 362(a)(3). 828 F.2d at 1025-26.

intent in enacting Section 105(a), the only evidence of Congress' intent cited in the Petition is a selectively edited passage appearing in both the House and Senate Reports. *See* Pet. at 14. The complete passage is far more instructive.

> The court has ample other powers to stay actions not covered by the automatic stay [of 11 U.S.C. § 362]. Section 105 . . . grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The district court and the bankruptcy court as its adjunct have all the traditional injunctive powers of a court of equity. . . . Stays or injunctions issued under [Section 105] will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee [or debtor in possession] move the court into action, rather than requiring the stayed party to seek relief from the stay. There are some actions, enumerated in the exceptions [to Section 362], that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 342, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6298; S. Rep. No. 589, 95th Cong., 2d Sess. 51, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5837 (citations only omitted). In essence, Congress determined in Section 362(a) that certain actions must be enjoined *in every case*. Beyond these activities, Congress granted to the courts the authority to enjoin other actions upon due consideration of the facts *in a particular case*.

Thus, in stark contrast to Petitioners' argument that Congress intended to rigidly restrict the bankruptcy court's power to stay proceedings to the confines of Sec-

tion 362(a), the Bankruptcy Code cloaks courts with sufficient power to expand the stay beyond the automatic provisions of Section 362 (1) upon application and (2) consistent with the traditional powers of a court of equity. The District Court's Preliminary Injunction Order is exemplary of such a ruling. Indeed, the Preliminary Injunction Order's ability to pass muster under the traditional test for such an order is already a matter of judicial record.

Although the Petition thrice charges that the District Court entered the Preliminary Injunction Order without any adherence to the applicable rules or evidentiary support, *see* Pet. at 13, 15, 19, the opposite is true. The Preliminary Injunction Order recites the steps followed:

> The cause came on to be heard on plaintiff's motion for preliminary injunction. The Court having considered [Robins] complaint, the memorandum of law and the declarations in support of the motion and the papers filed in opposition thereto and, having heard testimony and argument and considered the evidence presented, the Court adopts its remarks and rulings as stated from the bench and makes the following findings of fact, conclusions of law, and order for a preliminary injunction pursuant to Bankruptcy Rule 7065 and Federal Rule of Civil Procedure 65(d), all objections by opposing counsel being duly preserved.

App. at 2a.

The Preliminary Injunction Order proceeds from this preamble to make each of the four findings required for entry of a preliminary injunction order: (1) irreparable harm to the bankruptcy estate in the absence of the restraint, App. at 2a-6a, (2) strong likelihood of success on the merits (i.e., a successful reorganization), App. at 6a, (3) less likelihood of irreparable harm to the restrained party, App. at 6a, and (4) advancement of the public interest, App. at 7a. *See In re Provincetown Boston Airline, Inc.*, 52 B.R. 620, 625 (Bankr. M.D. Fla. 1985).

See also Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1032 (4th Cir. 1980). More to the point, the District Court took evidence regarding the pending civil action against Aetna by Ms. Piccinin and made these required findings with specific reference to actions by Dalkon Shield claimants against Aetna "under theories of conspiracy, fraud, negligence, misrepresentation and breach of warranty." App. at 4a.

Furthermore, with respect to the deleterious effect on the reorganization by the diversion of the debtor's key personnel, as well as Robins' need to participate in discovery and necessary monitoring of thousands of ongoing Dalkon Shield suits against co-defendants—a matter belittled by Petitioners—the District Court found from the evidence presented that such actions against co-defendants

> would require the participation of Robins' officers, executives and employees as witnesses and in pretrial and post-trial proceedings. The diversion of Robins' key personnel from the reorganization effort which would result from continuation of litigation in those 2,400 civil actions would impair Robins' reorganization effort and would be contrary to the public interest.

App. at 3a. Finally, the District Court held that its conclusions of law "shall be applied with equal force to all defendants similarly situated who are brought to the attention of this court." App. at 7a.

Every aspect of the Preliminary Injunction Order was challenged in the *Piccinin* appeal and was rejected by the Fourth Circuit. When this court denied further review, those issues were closed; the injunction was in place and fully operative. Thus, when the Petitioners came before the District Court in the instant matter, the question was not whether they were enjoined by the Preliminary Injunction Order. That issue had been decided. Instead, the issue was whether they should be relieved from the

Preliminary Injunction Order. In other words, having been subject to a valid injunction, the burden now was on Petitioners to show good cause why that injunction should be lifted. Petitioners failed in this showing.

Petitioners were unable to demonstrate that their position materially differed from Piccinin's. In fact, this Court's own records refute Petitioners' attempt to distinguish themselves from Ms. Piccinin. Petitioners' argument that their action falls beyond the scope of *Piccinin* is based upon their claim that no asset of the Chapter 11 estate will be placed in jeopardy. This, however, is precisely the argument advanced by Piccinin.

> Piccinin . . . seeks to proceed solely against Aetna on the issue of Aetna's independent liability for its own conduct and any judgment recovered would operate directly against Aetna and not on the Debtor's insurance or any other asset of Debtor's estate. Moreover, Piccinin has filed no claim in this Chapter 11 proceeding against Debtor.

Piccinin v. A. H. Robins Co., No. 86-211, *Petition for Writ of Certiorari* at 41.

Furthermore, Petitioners were incapable of making adequate assurances that relieving these 4,000 claimants from the preliminary injunction would not lead to the diversion of personnel forecast by the District Court. To the contrary, Aetna gave the District Court its assurance that it would seek to defend itself fully, including shifting any blame to Robins, if appropriate.

B. Even though the decision to issue or withhold an injunction under Section 105(a) will vary from case to case, depending on the circumstance presented, there is no dispute among the circuits as to the general interpretation to be given that provision in the Bankruptcy Code; and no important question of federal law is presented in the present case which requires resolution by this Court.

The Preliminary Injunction Order also is fully consistent with the weight of the existing judicial precedent as

first established by the court in *In re Otero Mills, Inc.*, 25 B.R. 1018, 1021 (D.N.M. 1982). In contrast to the picture of slim judicial support for *Otero Mills* and its progeny that is painted by Petitioners, the courts of virtually every circuit have cited *Otero Mills* favorably and adopted its view that Section 105(a) permits an injunction broader than the automatic stay when traditional principles of equity require. *See, e.g., In re S. I. Acquisition, Inc.*, 817 F.2d 1142, 1146 n.3 (5th Cir. 1987); *In re Brentano's, Inc.*, 36 B.R. 90, 92 (S.D.N.Y. 1984); *In re Lion Capital Group*, 44 B.R. 690, 701-02 (Bankr. S.D. N.Y. 1984); *In re Monroe Well Service, Inc.*, 67 B.R. 746, 751-52 (Bankr. E.D. Pa. 1986); *In re Electronic Theatre Restaurants Corp.*, 53 B.R. 458, 462 (N.D. Ohio 1985); *In re Forty-Eight Insulations, Inc.*, 54 B.R. 905, 909 (Bankr. N.D. Ill. 1985); *In re Peoples Bankshares, Ltd.*, 68 B.R. 536, 539-40 (Bankr. N.D. Iowa 1986); *In re Kalispell Feed & Grain Supply, Inc.*, 55 B.R. 627, 629 (Bankr. D. Mont. 1985); *In re TRS, Inc.*, 76 B.R. 805, 806-08 (Bankr. D. Kan. 1987); *In re A & B Heating & Air Conditioning, Inc.*, 48 B.R. 397, 401 (Bankr. M.D. Fla. 1985).

The courts of appeals considering *Piccinin* have not rejected its teaching but have restricted it to the specific unusual fact situation presented in that case. *See Teachers Insurance & Annuity Ass'n v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986) (observing that the Fourth Circuit found the requisite "unusual circumstances" in the Robins reorganization); *In re S. I. Acquisition, Inc.*, 817 F.2d 1142, 1148 (5th Cir. 1987). Because Petitioners are claimants in the Robins Chapter 11 case, they fall precisely within the same "unusual circumstances" existing in *Piccinin*.

Even the cases cited by Petitioners do not support a reading of Section 105(a) that would prohibit the action taken by the District Court in enjoining the third party litigation over the Dalkon Shield. For example, in *In re A. J. Mackay Co.*, 50 B.R. 756 (D. Utah, 1985), a case cited by Petitioners as being in conflict with

Piccinin, Pet. at 16, the court actually acknowledged that a stay of third party litigation may be required in appropriate circumstances. *Mackay* involved a stay of co-defendant litigation *after* plan confirmation. The court, however, did "not hold that, in extraordinary cases, a non-bankrupt co-debtor cannot be protected prior to confirmation of a plan." 50 B.R. at 762.

Similarly, the Preliminary Injunction Order does not conflict with this Court's decision in *Landis v. North American Co.*, 299 U.S. 248 (1936), which recognized that stays of litigation are necessary in "rare circumstances." *Id.* at 255. This reorganization case is a most rare circumstance, indeed. More importantly perhaps, the Preliminary Injunction Order does not require Petitioners "to stand aside while a litigant in another [cause] settles the rule of law that will define the rights of both." *Id.* Petitioners are claimants in the Chapter 11 case and are not being asked to stand aside. Instead, they are being asked not to burn the candle at both ends while the bankruptcy court is seeking to formulate a plan of reorganization providing payment in full of their claims.

The pendency of the motion for class certification in the *Breland* case further supports the District Court's decision not to lift its injunction to permit the filing of the actions proposed by Petitioners. Unlike Petitioners' proposals, the *Breland* case offered the potential of benefiting all the Dalkon Shield claimants in the Chapter 11 case. Furthermore, because *Breland* was pending before the same District Court handling the Robins reorganization, that court was assured the necessary control over this litigation to insure that it was not allowed to interfere with the progress of the Chapter 11 case.

In sum, the Petition does not bring a novel, important question to this Court. Instead, it brings a question that now has been decided twice by the Fourth Circuit in a manner that is fully consistent with the existing judicial interpretations of the Bankruptcy Code. Under all the circumstances attendant to this singular reorganization,

the court of appeals correctly affirmed the actions of the District Court.

C. An end is in sight.

The Petition concludes with the unfounded assertion that the Preliminary Injunction Order remains in place "with no termination date in sight." Pet. at 21. As the point has been raised by Petitioners, this Court should know that an end to the Preliminary Injunction Order is in sight. Presently before the bankruptcy court is Robins' proposed Fifth Amended Plan of Reorganization.[6] Unlike its predecessors, this proposed plan enjoys the endorsement of all the major committees in the Chapter 11 case, including the official Dalkon Shield Claimants' Committee. A hearing on the adequacy of the accompanying disclosure statement now is scheduled for March 21, 1988.

CONCLUSION

A paramount objective of Chapter 11 of the Bankruptcy Code is to provide an opportunity for a debtor successfully to reorganize. Section 105(a) of the Code, as it may be applied in a Chapter 11 reorganization, is an important tool permitting reorganization courts to shield debtors from disruption and diversion of resources that may threaten or impede the reorganization effort. The power to enjoin other litigation, if necessary to protect the reorganization effort, is widely recognized as within the Section 105(a) grant. Also recognized is the need, as in the case of any injunction, to balance the equities in the light of the extant circumstances presented.

The very reason for the Robins reorganization petition was the devouring cost, both in money and in energies, of the thousands of Dalkon Shield claims being prosecuted prepetition, claims which named not only Robins but other persons and entities associated in one manner or another with it. It became apparent soon after the

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[6] This version of the plan contains only technical revision of the Fourth Amended Plan of Reorganization, which also was endorsed by all committees.

filing of the Robins petition that continuation of the pre-petition litigation, even if only against the related parties, would consume substantial resources and threaten the reorganization. That determination led to the imposition of the Preliminary Injunction Order. That injunction was reviewed by the court of appeals and its necessity in the circumstances of this complex reorganization has been twice affirmed.

At the date of the orders denying Petitioners relief from that injunction, over 300,000 persons had registered with the reorganization court their intent to make a claim based on alleged Dalkon Shield related injuries. Were the reorganization court to have allowed Petitioners to commence and prosecute litigation against Robins' insurer, Aetna, in a different forum—litigation that inevitably would have drawn Robins into discovery and, ultimately, trials—no principled basis would have existed for denying the same relief to the hundreds of thousands of other claimants. It was certainly not an abuse of discretion, in these unique circumstances, to deny Petitioners relief from the injunction. For the reasons stated above, the petition should be denied.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Chapter 11

Case No. 85-01307-R

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor.

Employer's Tax Identification No. 54-0486348

Adversary Proceeding

No. 85-1006-R

(Retained Proceeding)

A. H. ROBINS COMPANY, INCORPORATED,
Plaintiff,

v.

NANCY CAMPBELL, KATHRYN CONRAD, JEANETTE DICHARRY and VERNON DICHARRY, ANNA PICCININ, LUISA MOSA and JACK MOSA, STELLA J. CAMP and JOHN H. CAMP, HELEN BARNETT and MICHAEL BARNETT, and EDNA LINDSEY RUMINSKI,
Defendants.

[Filed Oct. 11, 1985]

ORDER FOR PRELIMINARY INJUNCTION

This cause came on to be heard on plaintiff's motion for preliminary injunction. The Court having considered plaintiff's complaint, the memorandum of law and the declarations in support of the motion and the papers filed in opposition thereto and, having heard testimony and argument and considered the evidence presented, the Court adopts its remarks and rulings as stated from the bench and makes the following findings of fact, conclusions of law, and order for a preliminary injunction pursuant to Bankruptcy Rule 7065 and Federal Rule of Civil Procedure 65(d), all objections by opposing counsel being duly preserved:

Findings of Fact

As of August 21, 1985, the plaintiff in this action, A. H. Robins Company, Incorporated ("Robins") was named as the defendant in approximately 5,000 civil actions in state and federal courts throughout the country alleging injuries and seeking damages stemming from Robins' manufacture and marketing of the Dalkon Shield intrauterine contraceptive device. Pursuant to 11 U.S.C. Section 362(a), all litigation against Robins in those approximately 5,000 civil actions was stayed automatically on August 21, 1985 upon filing of Robins' petition for protection from its creditors under Chapter 11.

Approximately 2,400 of those civil actions name persons or entities other than Robins as co-defendants. Those approximately 2,400 civil actions seek damages from Robins co-defendants based upon theories of liability which are derivative of or interrelated with the causes of action or claims for relief asserted against Robins. Any judgment rendered against a Robins co-defendant in any one of those approximately 2,400 civil actions could result in a claim against Robins for either contractual indemnity or commonlaw contribution. Al-

though Robins may be entitled to relitigate the issue of its liability to each indemnity or contribution claim, the burden on Robins' estate of such litigation would significantly impede Robins' reorganization and render any plan of reorganization futile.

Moreover, many of those 2,400 civil actions against the co-defendants would require the participation of Robins' officers, executives and employees as witnesses and in pre-trial and post-trial proceedings. The diversion of Robins' key personnel from the reorganization effort which would result from continuation of litigation in those 2,400 civil actions would impair Robins' reorganization effort and would be contrary to the public interest.

The continuation of litigation in those 2,400 civil actions which name Robins' co-defendants poses a significant threat to Robins' reorganization effort and could cause a direct and substantial drain upon the assets of Robins' Chapter 11 estate. If this relief sought is not granted, a rush to judgment will likely ensue. Such a race to obtain judgments against Robins' co-defendants would be detrimental to the debtor and would adversely affect Robins' reorganization effort.

Any rejection by the debtor of its contractual duty to indemnify its officers, directors, and employees would adversely affect the debtor and would not be consistent with the debtor's reorganization under Chapter 11.

Defendant Nancy Campbell has a civil action pending in the United States District Court for The Western District of Wisconsin. In her complaint Ms. Campbell asserts claims against Robins, The Aetna Casualty and Surety Company, E. Claiborne Robins, Sr., E. Claiborne Robins, Jr. and Dr. Hugh J. Davis. Ms. Campbell seeks recovery from those defendants under theories of negligence, strict liability, implied and express warranties, misrepresentation, fraud and under the Racketeer Influenced and Corrupt Organization Act ("RICO"). The

continuation of litigation in the Campbell Action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Kathryn Conrad has a civil action pending in the Circuit Court for Baltimore City. In her complaint, Ms. Conrad asserts claims against Robins, Dr. Hugh J. Davis and Dr. Frederick A. Clark, Jr. Ms. Conrad seeks recovery from those defendants under theories of negligence, strict liability, fraudulent misrepresentation and conspiracy. The continuation of litigation in the Conrad action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendants Jeanette Dicharry and Vernon Dicharry have a civil action pending in The United States District Court for the Eastern District of Louisiana. In their complaint, the Dicharrys assert claims against Robins and Aetna Casualty and Surety Company (served herein as Aetna Life and Casualty). The Dicharrys seek recovery from those defendants under theories of strict liability, negligence, misrepresentation and breach of warranty. The continuation of litigation in the Dicharry Action against Aetna Casualty and Surety Company threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Anna Piccinin has a civil action pending in The United States District Court for The Middle District of Alabama. In her complaint, Ms. Piccinin asserts claims against Robins and The Aetna Casualty and Surety Company. Ms. Piccinin seeks recovery from those defendants under theories of conspiracy, fraud, negligence, misrepresentation and breach of warranty. The continuation of litigation in the Piccinin Action against The Aetna Casualty and Surety Company will impair and impede the debtor's reorganization effort.

Defendants Luisa Mosa and Jack Mosa have a civil action pending in The United States District Court for the District of Maryland. In their complaint, the Mosas assert claims against Robins and Dr. Hugh J. Davis. The Mosas seek recovery from those defendants under theories of fraud and deceit, involuntary testing and battery, negligence, strict liability, breach of warranty, violation of the Federal Food and Drug Act and conspiracy. The continuation of litigation in The Mosa Action against Dr. Hugh J. Davis threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendants Stella J. Camp and John H. Camp have a civil action pending in The Circuit Court for Madison County, Alabama. In their complaint, the Camps assert claims against Robins, D.L.K., Incorporated and John or Jane Does numbers three through nine. The Camps seek recovery from those defendants under theories of negligence, strict liability, misrepresentation, breach of warranty, conspiracy and fraud. The continuation of litigation in The Camp Action against any of Robins' co-defendants threatens to impair and impede the debtor's reorganization effort.

Defendants Helen Barnett and Michael Barnett have a civil action pending in the Circuit Court of the Ninth Judicial Circuit, Orange County, Florida. In their complaint, the Barnetts assert claims against Robins, Aetna Casualty and Surety Company, Florida Physicians Supply, Incorporated and Medical Supply Company of Jacksonville. The Barnetts seek recovery from those defendants under theories of willful negligence, fraud and misrepresentation, violation of State and Federal Food and Drug Acts, strict liability, breach of warranty and battery. The continuation of litigation in the Barnett Action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Edna Lindsey Ruminski has a civil action pending in the Superior Court for the Judicial District of New Haven, Connecticut. In her complaint, Ms. Ruminski asserts claims against Robins and Dr. Marshall R. Holley. Ms. Ruminski seeks recovery from those defendants under theories of negligence. The continuation of litigation in the Ruminski Action against Dr. Marshall R. Holley threatens to impair and impede the debtor's reorganization effort.

The eight civil actions described above are representative examples of similar civil actions among the approximately 2,400 civil actions currently pending against Robins which name persons or entities other than Robins as co-defendants. The continuation of litigation in those approximately 2,400 civil actions against the various categories of co-defendants represented by the eight civil actions described above would pose a serious threat to the success of the debtor's reorganization and is contrary to the public interest.

Conclusions of Law

The District Court exercising its jurisdiction under 28 U.S.C. Sections 1334(b) and (d), has the authority pursuant to 11 U.S.C. Section 105 and 28 U.S.C. Section 1651, to stay all actions which adversely affect the estate of the debtor and the debtor's reorganization effort and to stay all actions which will impair and impede the debtor's reorganization effort.

Robins has established that the likelihood of irreparable harm to Robins if this injunction is not granted outweighs the likelihood of irreparable harm to the defendants if the injunction is granted.

Robins has established the likelihood of its success on the merits and the likelihood of a successful reorganization if it is not burdened by continued litigation against it and its co-defendants.

Robins has established that the granting of this preliminary injunction is in the public interest.

The conclusions of law contained in this order constitute the law of this case and shall be applied with equal force to all defendants similarly situated who are brought to the attention of this court.

To the extent any of the foregoing conclusions of law constitute findings of fact, they are to be deemed as such, and vice-versa.

Order

Based upon the foregoing, and good cause appearing therefor, it is hereby

DECLARED all available proceeds of liability insurance issued to Robins are property of the debtor's estate pursuant to 11 U.S.C. Section 541 and any civil action seeking a judgment that might be satisfied from the proceeds of that insurance is automatically stayed pursuant to 11 U.S.C. Section 362(a);

ORDERED defendant Nancy Campbell is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85-C-230-S currently pending in the United States District Court for the Western District of Wisconsin; and further

ORDERED defendant Kathryn Conrad is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85231036 currently pending in the Circuit Court for the City of Baltimore, State of Maryland; and further

ORDERED defendants Jeanette Dicharry and Vernon Dicharry are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85-1243 currently pending in the United States District Court for the Eastern District of Louisiana; and further

ORDERED defendant Anna Piccinin is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-85-H-9120-N currently pending in the United States District Court for the Middle District of Alabama; and further

ORDERED defendants Luisa Mosa and Jack Mosa are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. H82-49 currently pending in the United States District Court for the District of Maryland; and further

ORDERED defendants Stella J. Camp and John H. Camp are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-85-671-W currently pending in the Circuit Court for Madison County, State of Alabama; and further

ORDERED defendants Helen Barnett and Michael Barnett are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 83-5426 currently pending in the Circuit Court for the Ninth Judicial District, Orange County, State of Florida; and further

ORDERED defendant Edna Lindsey Ruminski is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-81-0209979-S currently pending in the Superior Court for the Judicial District of New Haven, State of Connecticut.

This injunction shall remain in force until further order of this Court.

DATED: 10-11-85

/s/ Robert R. Merhige, Jr.
United States District Judge

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APPENDIX B

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

Chapter 11

No. 85-01307-R

Retained Proceeding
(Judge Merhige)

IN RE A. H. ROBINS COMPANY, INCORPORATED,
Debtor.

Employer's Tax Identification
No. 54-0486348

Adversary Proceeding

No. 86-1030-R

Retained Proceeding
(Judge Merhige)

A. H. ROBINS COMPANY, INCORPORATED, *et al.*,
Plaintiffs,

v.

JOHN T. BAKER, *et al.*,
Defendants.

[Filed Sept. 12, 1986]

CONSENT ORDER

This day came the defendant Charles M. Delbaum ("Delbaum"), pursuant to this Court's Show Cause Order dated August 25, 1986, and the continuance granted at Delbaum's request, and proffered unto the Court the following settlement:

1. The action styled *Anderson, et al.* v. *Aetna Casualty & Surety Company*, Civil Action No. 86-1672-K, pending in the United States District Court for the District of Kansas (the "*Anderson* action"), was dismissed without prejudice on September 8, 1986, and A. H. Robins Company, Incorporated ("Robins") and The Aetna Casualty & Surety Company ("Aetna") have been furnished evidence of such dismissal.

2. Delbaum will, along with each of the other defendants herein, pay an equal share of Robins' and Aetna's attorneys' fees and costs incurred as a result of the filing of the *Anderson* action.

3. Delbaum understands that he or anyone else by reason of this Court's Orders may not file any other suit or action for injuries arising from or related to the Dalkon Shield without first obtaining from the United States District Court in Richmond relief from the Stay and this Court's Preliminary Injunction Order dated October 11, 1985, or such other appropriate order from this Court expressly permitting the filing of such suit or action.

Upon consideration whereof, and with the consent of Delbaum, the Court hereby ORDERS Delbaum to comply with the terms of his settlement agreement as set forth above.

Whereupon, Robins and Aetna, by their respective counsel, moved the Court for leave to withdraw their

joint motion for a finding of civil contempt with respect to Delbaum, which motion is hereby GRANTED.

ENTER: 9/12/86

/s/ Robert R. Merhige, Jr.
Judge

WE ASK FOR THIS:

/s/ Linda J. Thomason
Counsel for A. H. Robins,
Company, Incorporated

/s/ W. Scott Street, III
Counsel for The Aetna
Casualty & Surety Company

/s/ Charles M. Delbaum
CHARLES M. DELBAUM

No. 87-1208

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

DONNA OBERG, *et al.*,
Petitioners,
v.
AETNA CASUALTY & SURETY CO. and
A. H. ROBINS CO.,
Respondents.

ALEXIA ANDERSON, *et al.*,
Petitioners,
v.
AETNA CASUALTY & SURETY CO. and
A. H. ROBINS CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' REPLY MEMORANDUM

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March 7, 1988

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1208

DONNA OBERG, *et al.*,

Petitioners,

v.

AETNA CASUALTY & SURETY CO. and A. H. ROBINS CO.,

Respondents.

ALEXIA ANDERSON, *et al.*,

Petitioners,

v.

AETNA CASUALTY & SURETY CO. and A. H. ROBINS CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY MEMORANDUM

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1. The final reason that respondents offer this Court for denying the Writ of Certiorari petitioners seek is that "[a]n end is in sight." Opposition at 14. Respondents state affirmatively that "an end to the Preliminary Injunction Order [of October 11, 1985] is in sight." *Id.* They imply that if the Fifth Amended Plan of Reorganization recently submitted to the Bankruptcy Court by respondent Robins is implemented, the preliminary injunction that has prevented petitioners from pursuing their claims against respondent Aetna will be lifted. Respondents' statement is not accurate; the implication is false. In fact, if the Fifth Amended Plan is approved

by the Bankruptcy Court, the preliminary injunction at issue in this case will become *permanent.*

The Fifth Amended Plan was filed by Robins in the Bankruptcy Court on February 11, 1988. Including the proposed Disclosure Statement and various exhibits attached thereto, it is over 400 pages in length. Because respondents have not provided any details concerning the Plan to this Court in their Opposition, salient portions of the Disclosure Statement and the Summary of the Plan contained in that Statement are included as a Supplemental Appendix ("S. App.") to this Reply.

In summary, the Fifth Amended Plan calls for the acquisition of Robins by another pharmaceutical company, American Home Products Corporation ("AHP"). S. App. 3, 12. As part of the merger agreement, AHP will pay $2.255 billion into a "Claimants Trust," which will administer, settle and pay individual claims by Dalkon Shield victims. S. App. 3-4, 14. Under the Plan, two members of the Robins family, who are, respectively, the Chairman of the Board and Chief Executive Officer of Robins, and who have been named as defendants in countless Dalkon Shield cases, will each contribute $5 million to the Claimants Trust. In consideration for that payment, all officers and directors of Robins will be released from personal liability to Dalkon Shield victims. S. App. 4, 6. Finally, respondent Aetna will pay $75 million to the Claimants Trust,[1] contingent upon the settlement of the *Breland* class action. *See* Petition at 6-7 & n.3, 21-22; S. App. 9 (describing the *Breland* case). In exchange for this payment of $75 million, Aetna hopes to obtain, through the mechanism of Robins' reorganization in bank-

[1] The Plan calls for Aetna to pay an additional $25 million to the new company that results from the acquisition of Robins by AHP. That $25 million will in turn be used by the new company to purchase insurance policies from Aetna in favor of the new company. The proceeds from these policies apparently may be used to pay Dalkon Shield claims not otherwise paid out of the Claimants Trust. S. App. 5.

ruptcy, a complete release of all claims by Dalkon Shield victims against Aetna for Aetna's own wrongdoing, and a *permanent* injunction preventing any Dalkon Shield victims ever from pursuing Aetna, or anyone else for that matter, in the future. S. App. 17-18, 21-22.[2]

Thus, the Plan discloses that Aetna, with the assistance of Robins, hopes to use Robins' reorganization in bankruptcy to achieve two ends: (1) prevent further discovery concerning petitioners' allegations that Robins and Aetna together obstructed justice and pursued policies concerning the testing and recall of the Dalkon Shield that directly resulted in substantial injuries, infertility, and death to hundreds of thousands of Dalkon Shield users and their families; and (2) enjoin permanently the pursuit and recovery of compensatory and punitive damages against Aetna for its role in these tortious and fraudulent acts. *See* Petition at 4.

The $75 million Aetna has agreed to pay to obtain this release of its liability is roughly 3% of the total funds that will be deposited into the Claimants Trust. If AHP makes its contribution of $2.255 billion to the Claimants Trust, as called for by the Plan, and that money is invested in accounts or instruments bearing interest at a rate of 8%, after only five months the interest on the AHP contribution will exceed Aetna's contribution. Thus, Aetna's proposed contribution to the planned reorganization is relatively miniscule. But the benefits it will obtain are enormous.

These aspects of the Fifth Amended Plan of Reorganization, upon which respondents rely but which they have

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[2] The Plan provides that all claims against Aetna will be released if: (1) the District Court refuses to permit Dalkon Shield victims to "opt out" of the *Breland* class (apparently in direct contravention of this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985) (holding that due process requires the opportunity to "opt out" of a class action)); or (2) even if a victim "opts out" of the *Breland* class, she thereafter receives payment from the Claimants Trust. S. App. 17-18.

failed to place before this Court, indeed demonstrate that the "end is in sight." But the "end" is not an end to the District Court's Preliminary Injunction Order that has prevented petitioners from pursuing their claims against Aetna; it is instead an end to petitioners' rights to pursue their claims against Aetna *at all*.[3] Respondents' assertion that "the end is in sight" because of the pendency of the Fifth Amended Plan of Reorganization is disingenuous. This Court should not be misled.

2. This case squarely presents important questions about judicial power and the limits on the exercise of that power, and related questions about the ability of respondent Aetna to manipulate the bankruptcy laws for its own benefit without ever submitting itself to the jurisdiction of a bankruptcy court. Respondents have not cited a single decision, other than in the case at hand, in which § 105 of the Bankruptcy Code ever has been utilized to stay litigation between third parties on the asserted basis that one of those parties might disrupt a bankruptcy reorganization effort by seeking discovery of the debtor's officers and employees. The Court of Appeals' affirmance of such an injunction is not only unprecedented, it affords power to the bankruptcy courts beyond the wildest imaginings of Congress when it enacted

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[3] In a recent *Wall Street Journal* article about Aetna's role in the Robins' plan of reorganization, Professor Frank Kennedy of the University of Michigan Law School was quoted as stating that if "dissident attorneys for [Dalkon] Shield claimants . . . challenge the Aetna agreement before the [Bankruptcy] [C]ourt approves it[,] the [C]ourt 'should and probably will delete (Aetna's) purported discharge.'" Another bankruptcy expert, New York attorney Martin Klein, is quoted in the same article as stating that "'[t]his is a very clever attempt,' by Aetna [to have the Bankruptcy Court relieve it of liability even though it is not a party to the bankruptcy reorganization], '[b]ut it isn't clear that it will work or that it ought to.'" *See Aetna Life Unit Tactic in Dalkon Case Is Seen Vulnerable to Legal Challenge*, Wall St. J., January 22, 1988, at 30, col. 4.

§ 105, and beyond the broadest limits described by any other court which has addressed the jurisdictional reach of § 105. *See* Petition at 13-20.

Respondents' attempt to characterize the decision below as a straightforward application of bankruptcy law principles consistent with the usual standards governing the issuance of stays of litigation is flawed. *See* Opposition at 13. Respondents seek to insulate this case from further review because in October, 1985 the District Court found, without any explanation or elaboration, that "[t]he continuation of litigation . . . against The Aetna Casualty and Surety Company will impair and impede the debtor's reorganization effort." Opposition App. at 4a. Two and a half years have passed and, despite repeated efforts by petitioners, the District Court has refused to lift this stay, despite any *real* showing by Robins that the petitioners' litigation against Aetna would hamper the reorganization effort. *See* Petition at 19-20. Meanwhile, and continuing through the filing of their Joint Opposition, Robins and Aetna have continued to proclaim, like Tweedledum and Tweedledee,[4] that "Aetna gave the District Court its assurance that it would seek to defend itself fully, including shifting any blame to

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[4] Aetna's proclamations of its readiness to defend itself vigorously by attacking Robins, and Robins' proclamations that Aetna's attack would interfere with the bankruptcy reorganization—when contrasted with the sweetheart deal these warriors struck in the Fifth Amended Plan of Reorganization—are indeed reminiscent of what Alice found on her journey through the looking glass:

> "Tweedledum and Tweedledee
> Agreed to have a battle;
> For Tweedledum said Tweedledee
> Had spoiled his nice new rattle.
> Just then flew down a monstrous crow,
> As black as a tar-barrel;
> Which frightened both the heroes so,
> They quite forgot their quarrel."

L. Carroll, *Through The Looking-Glass And What Alice Found There* 52 (Random House Centennial ed. 1965). *See also id.* at 65-69.

Robins, if appropriate." Opposition at 11. This bellicose posturing is belied by the nature of the agreements between Aetna and Robins that are reflected in the Plan of Reorganization.

Petitioners feel safe in repeating that *no showing* ever was made in the District Court or the Court of Appeals as to what specific discovery Aetna would seek of Robins in petitioners' lawsuits, and that *no showing* ever was made by Robins as to how and to what extent that discovery would impede the reorganization effort. *See* Petition at 19-20. In this Court, respondents simply state that "Aetna's *intention* to seek discovery from Robins . . . , if permitted, is a matter of record." Opposition at 6 (emphasis added). But respondents cannot dispute that this "record" is totally devoid of specificity. Under *Landis* v. *North American Co.*, 299 U.S. 248 (1936), and its progeny, *see* Petition at 20-21, the stay never should have been entered in the first place. The time long since has passed when the Preliminary Injunction should have been dissolved.

Now that the Robins reorganization apparently is nearing completion, the respondents' strategy in this litigation has been revealed: Under the Fifth Amended Plan of Reorganization Aetna proposes to make a minimal contribution to the payment of claims by Dalkon Shield victims; the principal shareholders and officers of Robins will make a payment that is even less substantial. In exchange for these payments, no further claims may be presented against Aetna, the Robins family, or any officer or director of Robins *ever*. The claims petitioners otherwise would have the right to pursue—with the potential to bring before a court and jury the destruction of documents, obstruction of justice and wanton disregard for the public's health and safety that petitioners allege to have occurred, and for which they seek appropriate redress—will be enjoined forever.[5] It is a strat-

[5] The Disclosure Statement notes in passing that "[a] federal grand jury investigation is presently being conducted in the United

egy that indeed is clever; but it is a strategy based on a fundamental misapplication of § 105 of the Bankruptcy Code that this Court should correct.

This Court should accept plenary review of this case and rule that the permissible scope of the power of bankruptcy courts to stay litigation under 11 U.S.C. § 105 does not extend to litigation between parties who have not filed for protection under the Bankruptcy Code. This Court's failure to act now may result in petitioners losing forever their rights to seek redress of their injuries suffered at the hands of respondent Aetna.

Respectfully submitted,

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March 7, 1988

States District Court for the District of Kansas in connection with the Dalkon Shield. The proceeding is under seal by court order." S. App. 8. The existence of this Grand Jury perhaps has provided additional motivation for respondents to sound the death knell for any additional civil discovery against Aetna and Robins.

On March 3, 1988 another Grand Jury, sitting in the Middle District of Florida, indicted a Robins expert witness for perjury and obstruction of justice based on trial testimony he gave in the case of *Harre* v. *A.H. Robins Co.*, 750 F.2d 1501 (11th Cir. 1985). *See Professor Is Charged With Lying For Maker of Birth Control Device*, N.Y. Times, March 4, 1988, at 1, col. 1. The Court of Appeals that reviewed the facts surrounding this expert's testimony concluded that he testified falsely "with complicity of counsel." 750 F.2d at 1505. Robins' counsel in that case had been retained by Aetna.

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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

EXCERPTS FROM THE FIFTH AMENDED DISCLOSURE STATEMENT

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

Chapter 11 Case

No. 85-01307-R

IN RE A. H. ROBINS COMPANY, INCORPORATED,
Debtor.

Retained Proceeding
(Judge Merhige)

FIFTH AMENDED AND RESTATED DISCLOSURE STATEMENT PURSUANT TO SECTION 1125 OF THE BANKRUPTCY CODE

February 11, 1988

[SUBJECT TO COURT APPROVAL]

ATTENTION DALKON SHIELD CLAIMANTS—A 10 PAGE SPECIAL NOTICE TO WOMEN WHO USED THE DALKON SHIELD FOLLOWS THE TABLE OF CONTENTS INSIDE.

* * * *

SPECIAL NOTICE TO WOMEN WHO USED THE DALKON SHIELD: HOW YOUR DALKON SHIELD CLAIMS WILL BE TREATED

The purpose of this section of the disclosure statement is to explain how your claim will be treated under the proposed Plan filed by Robins. It is only a brief summary. THE LEGAL DOCUMENTS THAT WILL GOVERN YOUR CLAIM ARE THE PLAN, THE TRUST AGREEMENTS, AND THE CLAIMS RESOLUTION FACILITY THAT ARE IN THIS BOOK. You should read the rest of this book carefully to help you decide how to vote on Robins' Plan. You should turn to the sections listed in the disclosure statement for more details. At the end of this section, you will be told how to get more information.

Your vote will help determine whether this Plan goes into effect. If this Plan goes into effect, payments to you will be as provided for in the Plan.

Background

On August 21, 1985, Robins filed for reorganization relief under Chapter 11 of the United States Bankruptcy Code. This filing followed many years of lawsuits over the Dalkon Shield IUD. Robins filed for Chapter 11 for two reasons. First, Robins had difficulty defending the many lawsuits filed against it relating to the Dalkon Shield. Second, Robins suffered from short term cash flow problems resulting from payment of the claims and lawsuits being brought against it for injuries said to have been caused by the Dalkon Shield.

Robins filed to obtain the time necessary to develop (i) a fair, orderly method for paying all valid Dalkon Shield claims and (ii) a plan for raising the money needed to pay those claims. Robins has filed a reorganization plan that it believes satisfies these two goals.

Under this Plan, Robins will be acquired by another pharmaceutical company, American Home Products Corporation ("AHP"). Robins will merge with a subsidiary of AHP. In this document, the company surviving the merger between Robins and a subsidiary of AHP is called "AHP Merger" or "the Successor Corporation." As part of the agreement to acquire Robins, AHP will cause money to be made available to pay valid Dalkon Shield claims. Other money available to pay these Dalkon Shield claims will come from money Robins has saved.

[2]

Money Available to Pay Dalkon Shield Claims

Under the Plan, Robins will set up two Trusts. Dalkon Shield Claims will be paid *solely* by the Trusts. The Trusts will administer and settle as well as pay the Dalkon Shield Claims. The Trustees—the people who are in charge of the Trusts—will be selected by the judge in charge of this Case. Robins will play no role in their selection. These Trustees will be totally independent of Robins.

Dalkon Shield Claims are divided into two types of Claims: Dalkon Shield Personal Injury Claims and Dalkon Shield Other Claims. Dalkon Shield Personal Injury Claims are those Claims held by people like you who used the Dalkon Shield and by certain relatives of those people. Dalkon Shield Other Claims are all other Dalkon Shield Claims. Dalkon Shield Other Claims include claims of others such as doctors, hospitals, distributors of the Dalkon Shield, and directors and officers of Robins who may have to pay other people for injuries said to have been caused by the Dalkon Shield. These Dalkon Shield Other Claimants would seek to be repaid by Robins for money they pay as a result of money paid or to be paid in connection with suits brought against them by Dalkon Shield claimants.

People who used the Dalkon Shield and eligible members of their families—people who have Dalkon Shield Personal Injury Claims—will be paid from the Claimants Trust. The Dalkon Shield Other Claimants Trust will be used to pay doctors, hospitals, officers and directors of Robins, and others if they pay money to other people in connection with the Dalkon Shield. If any person has to pay a Dalkon Shield claim and that person would have had the right to ask Robins to bear all or part of the payment had the bankruptcy case not occurred, then that person will be able to look to the Other Claimants Trust for payment. Before any person or company will receive final payment from the Other Claimants Trust, that person or company must show that it would have had the right to be paid by Robins.

The Claimants Trust will get the money to pay your Claims from Robins and AHP Merger. $2.255 billion will be paid to the Claimants Trust as soon as the Plan goes into effect. It is possible, however, that a start-up payment in the amount of $10 million will be made to the Claimants Trust before the $2.255 billion payment is made. If this $10 million payment is made, it will be deducted from the $2.255 billion payment.

In addition, the Other Claimants Trust may, from time to time, pay specified amounts of money to the Claimants Trust, if the Other Claimants Trust does not need the money and if the Trustees of the Other Claimants Trust decide these payments should be made.

[3] The Claimants Trust will also receive money from E. Claiborne Robins and E. Claiborne Robins, Jr. Mr. Robins is the Chairman of the Board of Directors of Robins. Mr. Robins, Jr. is the President and Chief Executive Officer of Robins. After the Merger occurs, they will pay $5 million to the Claimants Trust and $5 million to the Other Claimants Trust.

There is another possible source of money to pay your Claims. Money may be paid by The Aetna Life and

Casualty Company and related companies ("Aetna"). The money will be paid if a lawsuit that has been filed against Aetna, the Breland Case, is settled as provided in the Plan. If the Breland Case is settled, Aetna will pay $50 million to the Claimants Trust. Aetna will also pay $50 million to AHP Merger. AHP Merger will then immediately pay $25 million to the Claimants Trust and $25 million to Aetna as premium for certain insurance policies to be issued by Aetna in connection with the Plan and the settlement. In addition, Aetna will issue certain insurance policies that can be used to pay people with claims relating to the Dalkon Shield if their claims are not otherwise paid.

To be sure that there will be enough money available to pay all valid Dalkon Shield claims under the Plan, the Court conducted a hearing to estimate the value of Dalkon Shield claims. This hearing began on November 5, 1987, and ended on November 11, 1987. The Court heard evidence from all parties about the value of the Dalkon Shield Claims. The Dalkon Shield Claimants' Committee, which represents claimants like you, presented a great deal of evidence about the value of the claims. So did Robins and others. The evidence presented by all parties was the result of a great deal of work by experts. On December 11, 1987, the Court announced its decision that the total amount of money necessary to pay all Dalkon Shield claims and all expenses of the Trusts in full was $2.475 billion, payable over a reasonable period of time.

Under the Plan, enough money will be paid into the Claimants Trust to permit payment in full of the Dalkon Shield claims and expenses of the Trusts. Because the estimation process is not an exact science, the money available to pay Dalkon Shield claims may prove to be more or less than the actual value of such claims. Trustees of the Claimants Trust may decide, from time to time, to delay payments made out of the Trust to

claimants to insure that there will be enough money in the Trust to pay all claimants. In that case, you might not be paid for this delay in the payment of your claim. It is possible, if the Trustees allow claims in a total amount above the Court's estimate, that some claimants may not receive full payment. It is also possible that there will be money left over. Under the Plan, a Claimant who does not receive full payment will never be able [4] to be paid by Robins, AHP Merger or officers and directors of Robins. If the Breland Case is settled, then, except for money from certain insurance policies Aetna will issue, you cannot be paid by Aetna. THE COURT MUST FIND, HOWEVER, BEFORE THE PLAN GOES INTO EFFECT, THAT THE PLAN PROVIDES ENOUGH MONEY TO SATISFY ALL VALID DALKON SHIELD CLAIMS AND EXPENSES OF THE TRUST IN FULL. As extra protection for claimants, Aetna will issue an insurance policy that will provide payments to claimants in case the Trust runs out of money, up to a certain amount.

It is also possible that there will be more than enough money to pay all claims. If there is enough money, people who would normally not have the right to be paid will get money. These people have claims that arose so long ago they would not be paid under normal legal rules. People who have claims that are valid and did not arise too long ago to be paid will be paid first. If money is left after all those claims are paid in full, valid claims that would be too old to be paid under normal legal rules will be paid from the Trust. If there is more than enough money, that is left over after these claims against and expenses of the Claimants Trust are paid in full, it will be divided among all people who received payments from the Trust in proportion to the amount of their payments. The Trustees can, however, decide not to make these payments if the amount of any payment would be extremely small. This money will take the place of punitive dam-

ages, which cannot be paid by the Trust. Punitive damages are monies paid in lawsuits over and above monies paid to compensate someone for their actual injuries. If there is no money left, there will be no payment in place of punitive damages.

* * * *

[14]

Dalkon Shield Litigation

Numerous lawsuits and claims alleging injuries claimed to be associated with use of the Dalkon Shield have been filed against Robins in the United States. Claims have also been filed against Robins in foreign countries. Lawsuits and claims have also been filed against Robins' insurer, Aetna Casualty and Surety Company ("Aetna"), and numerous co-defendants with Robins, including physicians and hospitals.

As of August 21, 1985, the date of commencement of the Case, there were approximately 6,000 suits and claims pending against Robins based on allegations concerning the Dalkon Shield. Through August 21, 1985, Robins had disposed of approximately 9,500 such suits and claims. In disposing of these suits and claims, Robins and its insurer had paid out approximately $530 million. Before 1981, substantially all disposition costs (including legal expenses, but excluding punitive damages) were charged to products liability insurance carried by Robins.

Of the Dalkon Shield-related claims and suits disposed of before August 21, 1985, 60 suits were tried to judgment. Of that number, 33 resulted in verdicts in favor of plaintiffs and 27 resulted in verdicts in favor of Robins. Ten of the plaintiffs' verdicts and eleven [15] verdicts in favor of Robins were the subject of pending appeals when the Case was commenced. The Court lifted the automatic stay to allow some of these appeals to go forward. In one of these appeals, *Tetuan v. A. H. Robins*

Company, the Kansas Supreme Court upheld a jury verdict which awarded $7.6 million in punitive damages, finding that punitive damages were appropriate under the facts of that case.

A federal grand jury investigation is presently being conducted in the United States District Court for the District of Kansas in connection with the Dalkon Shield. The proceeding is under seal by court order.

* * * *

The Insurance Settlement

Robins had product liability insurance with Aetna Life and Casualty Company ("Aetna Life") covering compensatory awards with respect to the Dalkon Shield for [16] periods before March, 1978. In 1979 Robins sued Aetna Life concerning its insurance coverage of Dalkon Shield liability. The case was settled in October, 1984. The principal terms of the settlement were (a) that Robins received $70 million in additional Dalkon Shield insurance coverage; (b) Aetna Life agreed to continue to handle and defend Dalkon Shield cases and claims on Robins' behalf; and (c) Robins and Aetna Life released each other from any claims that either had against the other as of the date of the Settlement Agreement (October 31, 1984) with respect to the manufacture and marketing of the Dalkon Shield and/or the issuance of insurance for or investigation, defense, settlement and handling of Dalkon Shield cases or claims. Aetna Life has filed a claim in this Case for reimbursement of approximately $58 million for expenditures and payments made or to be made by Aetna Life on behalf of Robins in accordance with insurance policies issued by Aetna Life to Robins as modified by certain agreements between Aetna Life and Robins (principally the Settlement Agreement). This amount includes but is not limited to items such as payments made by Aetna Life in excess of the extended limits of certain insurance policies; payments

made by Aetna Life as the guarantor of certain obligations of Robins in connection with the settlement of certain Dalkon Shield suits filed in Minnesota; and payments made by Aetna Life pursuant to Court order authorizing the reissuance of settlement checks written but not paid before the Case was filed. This amount also includes unliquidated and contingent claims for the fees and expenses of defense counsel who provided legal services to Robins before the Case was filed and for contribution from Robins based on actions filed against Aetna Life relating to the Dalkon Shield.

In April, 1986 a lawsuit was filed against Aetna Life. That lawsuit, *Breland v. Aetna Life and Casualty Co.* (the "Breland Case") is now pending in the Eastern District of Virginia, where the Robins Chapter 11 Case is pending. In the Breland Case, the plaintiffs assert numerous claims against Aetna Life, and attack the Settlement Agreement. The Breland Case has been stayed pursuant to an Order of the Court, although there have been limited exceptions to the stay.

As part of the Plan, Robins and Aetna Life and its affiliates (Aetna) have settled the controversies among them. See "SUMMARY OF THE PLAN—Other Provisions of the Plan—Compromise and Settlement with Aetna."

* * * *

[23]

Injunction of Dalkon Shield Litigation against Robins' Co-Defendants

At the time the Case was filed, Robins was named as a defendant in approximately 5,000 civil actions pending throughout the country seeking damages in connection with the Dalkon Shield. The filing of the Case invoked the protection of the automatic stay of section 362 of the Code, pursuant to which all pending litigation against Robins was suspended automatically. However, in ap-

proximately half of the pending civil actions, other persons or entities were named as co-defendants along with Robins. The claims against those co-defendants were also based on the Dalkon Shield and sought damages derivative of, or related to, the causes of action against Robins.

Robins sought relief from the burden that the litigation represented by commencing an action against [24] eight representative plaintiffs for a preliminary injunction against continuation of Dalkon Shield litigation against any co-defendants on the grounds, among others, that continuation of the litigation posed a significant threat to Robins' ability to reorganize and would result in a direct and substantial drain on Robins' remaining insurance coverage with a corresponding diminution in funds available for creditors and claimants under a plan of reorganization. See "THE COMPANY—The Insurance Settlement."

On October 11, 1985, the Court ordered that Dalkon Shield litigation against co-defendants would be enjoined until further order of the Court. The order was appealed to the United States Court of Appeals for the Fourth Circuit and argued on December 3, 1985. On April 10, 1986, the Court of Appeals upheld the Court's granting of the preliminary injunction. Subsequently, two groups of claimants commenced suits in state courts against one of the co-defendants, Aetna Life, but carefully tailored their complaints. The two groups eventually sought Court approval to commence these suits, arguing that their suits would have no effect on Robins, but Court approval was denied. An appeal was taken to the Fourth Circuit Court of Appeals, which, in an order dated September 9, 1987, upheld the Court's decision, reasoning that Aetna Life would have to implicate Robins in any suit concerning the Dalkon Shield, and that these suits should therefore be stayed.

* * * *

[35]

Dalkon Shield Claimants' Committee Motions to Commence Suits

On August 8, 1987, the Dalkon Shield Claimants' Committee filed a motion for leave to commence an adversary proceeding on behalf of Robins against E. Claiborne Robins, E. Claiborne Robins, Jr., William L. Zimmer, III, all of whom are directors of Robins, and McGladrey, Hendrickson & Pullen, certified public accountants. In its motion, the Dalkon Shield Claimants' Committee alleged that Robins had failed to pursue colorable claims against the three directors and against McGladrey, Hendrickson & Pullen, and that the Court should allow it to pursue them in Robins' behalf. More specifically, the Dalkon Shield Claimants Committee alleged that the three named directors were liable to Robins for, among other actions, causing Robins to declare and pay improper dividends. The Dalkon Shield Claimants' Committee also alleged that McGladrey, Hendrickson & Pullen was liable to Robins for, among other things, failing to adequately account for estimated Dalkon Shield liability.

On August 13, 1987, the Dalkon Shield Claimants' Committee filed a motion for leave to commence adversary proceedings on behalf of Robins against Aetna Life and certain of Robins' subsidiaries. In its motions, the Dalkon Shield Claimants' Committee alleged that Robins had failed to pursue colorable claims against Aetna Life and the subsidiaries and that the Court should allow it to pursue them on Robins' behalf. More specifically, the Dalkon Shield Claimants' Committee alleged that Aetna Life is jointly liable with Robins to Dalkon Shield claimants for failure to make a timely disclosure to the Dalkon Shield claimants of the health risk associated with the use of the Dalkon Shield. The Dalkon Shield Claimants' Committee further argued that Robins has a claim against Aetna Life for contribution in connection with

settlements and judgments, paid and to be paid, to resolve Dalkon Shield claims. The Dalkon Shield Claimants' Committee also alleged that Robins has a claim for contribution against certain Robins subsidiaries that were either involved in the manufacture of the Dalkon Shield or that sold and distributed the Dalkon Shield abroad.

On August 18, 1987, Robins filed a response to the Dalkon Shield Claimants' Committee's motions, urging the Court not to authorize the commencement of these suits or in the alternative that the Court stay these [36] suits. A report of the examiner stated that there were certain colorable claims against certain officers, directors and Aetna Life, and that actions should be commenced to toll the running of the statute of limitations. At a hearing held on August 19, 1987, the Court granted the Dalkon Shield Claimants' Committee's motions but, in an order dated September 4, 1987, ordered that immediately following perfection of service of process sufficient to toll the statute of limitations the suits against all defendants be stayed.

* * * *

[39]

PROPOSED MERGER WITH AMERICAN HOME PRODUCTS CORPORATION

Background

Pursuant to an Agreement and Plan of Merger to be dated as of ————, 1988, (the "Merger Agreement") Robins and American Home Products Corporation ("AHP") will agree to the acquisition of Robins by AHP on the terms summarized below. This acquisition is a cornerstone of the Plan: should the Merger not take place for any reason, the Plan will not be consummated. The Merger Agreement will not be executed until its execution is approved by the Court pursuant to an order that has become a Final Order. Robins intends to file a

motion requesting such approval in the immediate future. The Merger Agreement is summarized below. THE SUMMARY OF THE MERGER AGREEMENT IS QUALIFIED IN ITS ENTIRETY BY REFERENCE TO THE MORE DETAILED INFORMATION SET FORTH IN THE MERGER AGREEMENT WHICH IS ATTACHED AS ANNEX 5.

• • • •

[44]

Conditions to Closing

The Merger Agreement contains a number of conditions to closing that must be met for the Merger to occur and, therefore, for the Plan to be consummated. Key conditions to closing include:

Breland Settlement. Neither AHP nor Robins will consummate the Merger unless there shall have been entered an order dismissing with prejudice the Breland Case. This condition may not be waived by either AHP or Robins.

• • • •

[49] SUMMARY OF THE PLAN

Robins expects that under the Plan holders of Claims against the interests in Robins will obtain a recovery with a value in excess of what otherwise would be available if the assets of Robins were liquidated under Chapter 7 of the Code. See "ACCEPTANCE AND CONFIRMATION OF THE PLAN—Best Interests of Creditors and Stockholders—Liquidation Analysis."

THE FOLLOWING IS A SUMMARY OF CERTAIN SIGNIFICANT ELEMENTS OF THE PLAN. THIS SUMMARY OF THE PLAN IS QUALIFIED IN ITS ENTIRETY BY REFERENCE TO THE MORE DETAILED INFORMATION SET FORTH IN THE PLAN AND THE EXHIBITS THERETO.

• • • •

[54]

Treatment of Dalkon Shield Personal Injury Claims

On the Consummation Date, Robins will cause (i) the execution and delivery of the Claimants Trust Agreement, thereby establishing the Claimants Trust, and (ii) the payment by Robins of the Claimants Trust Funding Payment of $2.255 billion to the Claimants Trust. Funding of the Claimants Trust will be reduced by an earlier start up payment made to the Claimants Trust. A start up payment of $10 million will be made to the Claimants Trust to pay for initial administrative expenses of the Trust if the Consummation Date does not occur within 90 days after the Confirmation Date. Additional funding may be supplied to the Claimants Trust through Transfer Payments from the Other Claimants Trust. Moreover, additional funding and excess insurance may be supplied to the Claimants Trust by Aetna.

In addition, $5 million will be paid to the Claimants Trust by E. Claiborne Robins and E. Claiborne Robins Jr. This payment will be paid after the Confirmation Order had been entered if there have been no changes to the Plan as filed February 1, 1988 that materially and adversely effect either E. Claiborne Robins or E. Claiborne Robins Jr. and if there has been no change to the release or injunction provided in Sections 8.03 and 8.04 of the Plan filed February 1, 1988 that is adverse to either of them. So that no violation of the Shareholders Agreements (which are a condition to the Merger) will occur, this payment will be made on the fifteenth day after the date that financial results covering at least thirty days of post-Merger combined operations of AHP and Robins (within the meaning of the Pooling Rules as those terms are defined in the Merger Agreement) have been published.

On the Consummation Date, Robins will transfer to the Claimants Trust, for the benefit of the Claimants Trust as an insured party thereunder, all insurance poli-

cies under which Robins or any Affiliate may be covered in respect to Dalkon Shield Claims, to the full extent of such coverage, that are assignable without cancellation or reduction of coverage and which Robins elects to transfer. With respect to such insurance policies that Robins does not elect to transfer, Robins will take all actions as are necessary or desirable to enable the Claimants Trust at its expense, to obtain the benefits of coverage thereunder. If Aetna fulfills its obligations [55] under the Plan, however, these insurance policies will not include policies written by Aetna. See "SUMMARY OF THE PLAN—Other Provisions of the Plan—Compromise and Settlement with Aetna."

The Claimants Trust will assume full responsibility for resolving all Dalkon Shield Personal Injury Claims pursuant to the Claimants Trust Agreement and the CRF, for making payments on account of Dalkon Shield Personal Injury Claims that become Allowed Dalkon Shield Personal Injury Claims, for fulfilling its other obligations under the Claimants Trust Agreement, for paying Dalkon Shield Liquidated Claims of Personal Injury Claimants that are or become Allowed Claims, and for paying its own costs and expenses, all as more fully set forth in the Claimants Trust Agreement. See "THE DALKON SHIELD CLAIMANTS TRUST."

Persons with Dalkon Shield Personal Injury Claims may only look to the Claimants Trust for payment. The Court has found that the amount of money available to this Trust is sufficient to pay all Allowed Dalkon Shield Personal Injury Claims in full. If the funds available to the Claimants Trust nevertheless should ultimately prove to be insufficient to satisfy all Dalkon Shield Personal Injury Claims and Dalkon Shield Liquidated Claims of Personal Injury Claimants in full, a person with a Dalkon Shield Personal Injury Claim may not receive full, or possibly any, compensation depending on procedures established by the Trustees.

Treatment of Dalkon Shield Other Claims

On the Consummation Date, Robins will, in full satisfaction and discharge of all Dalkon Shield Other Claims and Dalkon Shield Liquidated Claims of Other Claimants, cause (i) the execution and delivery of the Other Claimants Trust Agreement, thereby establishing the Other Claimants Trust, (ii) the payment by Robins of the Other Claimants Trust Funding Payment of $45 million to the Other Claimants Trust and (iii) the performance of certain Robins' obligations under the Plan. In addition, $5 million may be paid to the Other Claimants Trust by E. Claiborne Robins and E. Claiborne Robins Jr. This payment will only occur if after the Confirmation Order has been entered there have been no changes to the Plan filed February 1, 1988 that materially and adversely effect [56] either E. Claiborne Robins or E. Claiborne Robins Jr. and if there has been no change to the release or injunction provided in Sections 8.03 and 8.04 of the Plan filed February 1, 1988 that is adverse to either of them. So that no violation of the Shareholder Agreements (which are a condition to the Merger) will occur, this payment will be made on the fifteenth day after the date that financial results covering at least thirty calendar days of post-Merger combined operations of AHP and Robins (within the meaning of the Pooling Rules as those terms are defined in the Merger Agreement) have been published. Subject to the continuing jurisdiction of the Court, the Other Claimants Trust will assume full responsibility for resolving all Dalkon Shield Other Claims, for making payments on account of Dalkon Shield Other Claims under the conditions set forth in the Other Claimants Trust Agreement, for paying Dalkon Shield Liquidated Claims of Other Claimants, for fulfilling its other obligations under the Other Claimants Trust Agreement, and for paying its own costs and expenses, all as set forth in the Other Claimants Trust Agreement. See "THE DALKON SHIELD OTHER CLAIMANTS TRUST."

To the extent that money is available in the Other Claimants Trust, Transfer Payments may be made to the Claimants Trust in accordance with the schedule annexed to the Other Claimants Trust Agreement. See "THE DALKON SHIELD OTHER CLAIMANTS TRUST—DISTRIBUTIONS TO THE CLAIMANTS TRUST."

* * * *

[60]

Other Provisions of the Plan

The following paragraphs summarize certain significant provisions of the Plan other than those regarding the classification and treatment of Claims and interests. The Plan itself should be referred to for the complete text of these and other provisions of the Plan.

Compromise and Settlement with Aetna. In order to obtain an additional source of funding for Dalkon Shield Personal Injury Claims and to enable Robins and AHP to satisfy a condition of the Merger Agreement:

(a) On the later of (i) the date, if any, that an order in the Breland Case approving a qualified Breland Settlement dismissing [] the Breland Case with prejudice shall have become a Final Order, (ii) the Consummation Date, and (iii) the date Aetna Life and Casualty Company (and its Affiliates) ("Aetna") has performed its obligations under the Qualified Breland Settlement, Aetna will be entitled to and shall benefit from certain releases and the injunctions provided for in the Plan, and from that time forward claims against Aetna shall not be Unreleased Claims, except claims and actions against Aetna relating to any insurance policies that may be issued by Aetna in connection with the Plan or settlement of the Breland Case shall not be released and enjoined. The preceding sentence notwithstanding, these injunctions and releases shall not apply to any claims against Aetna held by persons who opt out of the plain-

tiff class in the Breland Case (if opt outs are permitted), unless and until such Persons receive payment in full from the Claimants Trust pursuant to the Plan. [61] A "Qualified Breland Settlement" will include terms at least as favorable to the Claimants Trust, those asserting Dalkon Shield Personal Injury Claims, and to Robins, AHP, the Successor Corporation, and any of their Affiliates as the following:

> (i) On or before the later of (x) the tenth Business Day after the day upon which an order approving the settlement of the Breland Case and dismissing it with prejudice shall have become a Final Order and (y) all other conditions precedent to Aetna's obligations under the settlement have been satisfied, Aetna shall be required to cause $50 million to immediately be deposited into the Claimants Trust;
>
> (ii) Aetna will pay $50 million to the Successor Corporation ($25 million of which shall immediately be deposited by the Successor Corporation into the Claimants Trust and $25 million of which shall immediately be paid to Aetna in respect of the premium on the insurance policies issued or to be issued by Aetna under a Qualified Breland Settlement); and
>
> (iii) Aetna will issue and deliver all those policies of insurance described in Exhibit E to the Plan on the terms and conditions substantially as set forth in Exhibit E to the Plan. These policies are described in Annex 6 to this disclosure statement.

(b) In the event the Consummation Date occurs before the order approving the Qualified Breland Settlement and dismissing the Breland Case becomes a Final Order, then, on the Consummation Date, Aetna will issue the Primary Excess Policy with a limit of $50 million and an Outliers Policy, such policies to have terms and conditions substantially as set forth in Exhibit E to

the Plan. These policies are described in Annex 7 to this disclosure statement. If the Qualified Breland Settlement is thereafter implemented, then these policies shall become a part of and not in addition to the policies required to be issued as a part of the Qualified Breland Settlement.

[62] (c) On the Consummation Date.

(i) the Claim of Aetna will become a Disallowed Claim;

(ii) Adversary Proceeding No. 87-1006, commenced in the Case against Aetna by the Dalkon Shield Claimants' Committee, in its own right on behalf of Robins, will be designated as a claim by and under the control of Robins, and such proceeding, including, Aetna's counterclaim, will be dismissed with prejudice;

(iii) The policies issued by Aetna under paragraph (b) above shall discharge all claims Robins, the Successor Corporation and their subsidiaries and Affiliates may have with respect to any coverage remaining under those insurance policies issued by Aetna to Robins and/or its subsidiaries that afford coverage for the Dalkon Shield.

Discharge; Release. Except as otherwise expressly provided in the Plan, the confirmation of the Plan will provide that Robins is discharged on the Confirmation Date [from] all debts of Robins arising before the Confirmation Date, including all debts based upon or arising from Dalkon Shield Claims and Dalkon Shield Liquidated Claims and all claims for interest. It is the intent of the Plan that holders of Dalkon Shield Claims look exclusively to the Trusts for resolution and compensation of their Claims after consummation of the Plan.

The Plan also provides that, except as otherwise expressly provided in the Plan, effective as of the Confirma-

tion Date, all Persons who have held, hold or may hold Claims, including Dalkon Shield Claims or Dalkon Shield Liquidated Claims, who have held, hold, or may hold Robins Common Stock and Robins, the Successor Corporation, and their Affiliates in consideration of the obligations of Robins and the Successor Corporation under the Plan, are deemed to have forever released all claims that they possess or may possess against any Person based upon or related in any manner to the Dalkon Shield.

This release, however, shall not apply to any insurer (including, subject to section 6.06 of the Plan, [63] Aetna) or to claims based exclusively on medical malpractice if, but only if, such claims cannot be, either directly or indirectly, asserted or brought over against the Trusts, Robins, the Successor Corporation, any Affiliates thereof, or any other Person intended to be protected by the injunction in the Plan.

In addition, the Plan also does not release any claims Robins, the Successor Corporation or any Affiliate thereof or either of the Trusts may have against Aetna relating to the insurance policies to be issued by Aetna in connection with the Plan or settlement of the Breland Case.

These release provisions may have important ramifications for the holder of an Allowed Dalkon Shield Personal Injury Claim if the Trusts are insufficiently funded and the additional insurance to be provided by Aetna (which will aggregate at least $100 million and could be as much as $350 million) is exhausted. Such ramifications include the fact that Personal Injury Claimants will have virtually no recourse to seek compensation for any injuries from the Dalkon Shield except as provided in the CRF. Even if the Trusts are insufficiently funded to provide any compensation, the holder of a Dalkon Shield Personal Injury Claim may not attempt to recover from Robins or any other Person. The Court has found, however, that the Trusts are sufficiently funded to pay all

allowed Dalkon Shield Personal Injury Claims in full. In any event, after confirmation of the Plan, Dalkon Shield Personal Injury Claim[ant]s may not be able to successfully challenge the validity of the releases or other provisions of the Plan in other courts.

Injunction. The order confirming the Plan will enjoin all Persons who have held, hold, or may hold Claims, who have held, hold or may hold Robins Common Stock and Robins, the Successor Corporation and any of their Affiliates, from taking certain actions against Robins, the Successor Corporation, or any Affiliate thereof, or any other Person including either of the Trusts inconsistent with the provisions of the Plan. Under the Plan, the Court must enjoin the commencement of any action or other proceeding with respect to such Claim against Robins, the Successor Corporation or any Affiliates thereof or any other Person including either of the Trusts, or Robins property, with respect to any Claim or Dalkon Shield-Related Claim, the enforcement, attachment [64] or recovery by any manner or means of any judgment, award, decree or order against Robins, the Successor Corporation, or any Affiliates thereof, or any other Person, including either of the Trusts, or Robins property, with respect to such Claim or Dalkon Shield-Related Claim or the creation, perfection or enforcement of any encumbrance against Robins, the Successor Corporation or any Affiliates thereof, or any other Person including either of the Trusts, or the property of either, with respect to such Claim or Dalkon Shield-Related Claim, and the assertion of any setoff, right of subrogation, or recoupment against any obligation or property of Robins, the Successor Corporation, or any Affiliates thereof, or any other Person including either of the Trusts with respect to any such Claim or any Dalkon Shield-Related Claim, from any act, in any manner, in any place whatsoever, that does not conform to or comply with the Plan. See "SUMMARY OF THE PLAN—Conditions Precedent—Conditions to Consummation."

This injunction shall not, however, prohibit Persons from asserting certain limited claims exclusively for medical malpractice or against insurers (including Aetna, except as specifically provided in the Plan). Also, the injunction does not apply to any claim by Robins, the Successor Corporation, any Affiliate thereof or either of the Trusts against Aetna relating to any insurance policies that may be issued by Aetna in connection with the Plan or settlement of the Breland case.

Although the Plan's provision for the release of Persons other than the Trust and the injunction against the assertion of Dalkon Shield-Related Claims other than against the Trusts is subject to legal challenge, Robins believes that adequate bases exist for courts to uphold the release and injunction.

After the order confirming the Plan becomes final, holders of Dalkon Shield Personal Injury Claims may not be able to challenge the validity of the release and injunction in other courts. Most importantly, Robins believes that funds available to the Trusts are adequate to pay all Dalkon Shield-Related Claims in full, so that there will be no need to seek recourse against any Persons other than the Trusts. However, in the event that the funds available in the Trusts are inadequate to pay all Dalkon Shield Claims and Dalkon Shield Liquidated Claims in full, Dalkon Shield claimants will, neverthe- [65] less, be enjoined from taking virtually any action to recover for their damages apart from those procedures provided for under the Trust Agreements and in the CRF, including any action against the Successor Corporation, or officers and directors of Robins. The Plan requires that to confirm the Plan, the Court must rule that the funds available in the Trusts are adequate to pay all Dalkon Shield claims in full.

* * * *

[66]

Conditions Precedent

The Plan provides that certain conditions must be met or waived by AHP or Robins and AHP both before confirmation of the Plan may occur, and that certain conditions must be met or waived by AHP or Robins and AHP both before consummation of the Plan may occur.

Conditions to Confirmation. For confirmation of the Plan, the Merger Agreement must have been executed and delivered.

Conditions to Consummation. The Plan provides that consummation of the Plan shall not occur unless the Confirmation Order shall have become a Final Order. The Confirmation Order must provide as follows:

1. that any Person now or hereafter asserting a right to payment against Robins related to the Dalkon Shield held a dischargeable Claim against Robins if the Dalkon Shield relating to the Claim was inserted before the commencement of the Case;

2. that the Dalkon Shield Claim of any Personal Injury Claimant who failed to file with the Court a timely and proper written notice of claim is a Disallowed Claim unless it is to be reinstated in accordance with the CRF;

3. that Robins is discharged immediately from any claim and any debt that arose before the Confirmation Date;

4. that Robins' liability for all such Claims or debts, and for the costs and expenses of the Trusts is limited to the amounts that it is paying or causing to be paid under the Plan, the payments into the Trusts provided for in the Plan are sufficient to pay all Allowed Dalkon Shield Personal Injury Claims, Allowed Dalkon [67] Shield Liquidated Claims and costs and expenses of the Trusts;

5. that any portion of any Dalkon Shield Claim that is a Claim for punitive damages is a Disallowed Claim; provided, however, that holders of Dalkon Shield Claims subject to the CRF are entitled to receieve from the Claimants Trust any sums payable in lieu of punitive damages pursuant to the CRF;

6. that at least five days before the first day of the confirmation hearing (the "First Hearing Day"), each Person retained or requesting compensation pursuant to sections 327, 328, 330, 503(b) and 1103 of the Code filed with the Court a binding estimate of the maximum amount of allowance of compensation and reimbursement of expenses to be requested in the Case (including any compensation for substantial contribution in the Case or for any fees or premiums in addition to normal hourly charges or quoted fees), for the period from the commencement of the Case through the First Hearing Day;

7. that the Plan does not provide for the liquidation of all or substantially all of the property of Robins' estate, and shall contain the releases and injunction provided for in section 8.03 and 8.04 of the Plan and provide that such releases and injunctions are effective as provided in the Plan;

8. that the transfers of property by Robins to the Successor Corporation (i) are or will be legal, valid and effective transfers of property; (ii) vest or will vest the Successor Corporation with good title to such property free and clear of all liens, charges, claims, encumbrances, or interests, except as expressly provided in the Plan; (iii) do not and will not constitute fraudulent transfers or conveyances under the Code or under the laws of the United States, and State, territory, possession or the District of Columbia; and (iv) do not and will not subject the Successor Corporation or its Affiliates to any liability by reason of such transfer under the laws of the United States, any State, territory or possession thereof

or the District of Columbia based, in whole or in part, directly or indirectly, on any theory of law, including without limitation, any theory of successor or transferee liability;

[68] 9. that the provisions of the Confirmation Order shall be nonseverable and mutually dependent;

10. that all conditions to the closing of the Merger Agreement shall have been satisfied (or waived in accordance with the provisions of the Merger Agreement) and the cash payments referred to in Sections 5.01 and 5.02 of the Plan shall have been made to the Trusts;

11. that all executory contracts and unexpired leases assumed by Robins during the Case or under the Plan will be assigned and transferred to the Successor Corporation;

12. that the maximum aggregate liability, if any, of Robins to Rorer Group Inc., Rorer Merger Corp., their affiliates or agents, arising under or related to the Agreement and Plan of Merger among Rorer Group Inc., Rorer Merger Corp. and Robins is $25 million plus the out-of-pocket expenses of Rorer Group Inc., if any, that may be recoverable under section 9.2 of such agreement;

13. that the complaint regarding alleged improper dividend payments filed in the Case is dismissed with prejudice and that the defendants named therein shall be released for all liability to Robins for all matters that were alleged [or] that could have been alleged in the complaint, upon payment of the $10 million by Mr. Robins and Mr. Robins Jr. to the Trusts (the "Robins Family Contribution") (with each side to bear its own costs);

14. that the contested matter in the Case regarding a Robins helicopter is dismissed with prejudice (with each side to bear its own costs) and further that the clerk is directed to pay the sum deposited by E. Claiborne Robins Jr. into the registry of the District Court

in connection with such contested matters, together with any earnings thereon, to Robins and that in exchange for such payment, E. Claiborne Robins Jr. shall be released for all liability to Robins for those matters that were alleged or could have been alleged in that contested matter;

15. that the Claims evidenced by the proofs of claim filed by present and former officers and directors for indemnification and contribution with respect to acts [69] or omissions related to Dalkon Shield are Allowed Claims upon payment of the Robins Family Contribution;

16. that the releases and injunction provided in Sections 8.03 and 8.04 of the Plan are an integral part of the compromises and settlements incorporated in the Plan;

17. that the Robins Family Contribution is valuable consideration for the release contained in Section 8.03, the injunction provided in Section 8.04 of the Plan, other terms and conditions of the Plan, and the benefits of the Other Claimants Trust; and

18. for the establishment of the Trusts and the transfers to the Trusts pursuant to Sections 5.01 and 5.02 of the Plan.

Other conditions to consummation are that the Class Action Settlement shall have been approved by a Final Order, and the Court shall have entered a Final Order providing that the Fee Claims shall be capped.

A final condition to consummation is that no request for revocation of the order confirming the Plan under section 1144 of the Code shall have been made and still be pending.

Unless the above conditions to confirmation and consummation are fulfilled, the Plan will not go into effect even if all the other requirements have been satisfied.

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